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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

HERBY BRANSCUM, JR., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the August 5, 1995 order entered by the Special Division of the Court of Appeals for the District of Columbia appointing Kenneth W. Starr as independent counsel violate the Appointments Clause and Article III of the Constitution by providing him with prosecutorial jurisdiction over allegations concerning any person whose name arises during his investigation even if that jurisdiction is not demonstrably related to the factual circumstances which gave rise to the appointment?

2. Are the decisions of the Attorney General to refer matters related to initial prosecutorial jurisdiction subject to judicial review where the initial prosecutorial jurisdiction is challenged as an unconstitutional and unlawful grant of power?

3. Are the recusal determination and preliminary investigation requirements of 28 U.S.C. § 591(c) mandatory prerequisites to a referral by the Attorney General to independent counsel of a non covered person under the provisions of 28 U.S.C. § 594(e)?

4. Does Kenneth W. Starr's failure to file the sworn affidavit imposed under 5 U.S.C. § 3332 within the required thirty days of his appointment cause his actions as independent counsel to be void because the filing of this affidavit was a condition precedent to him becoming empowered with the appointment?

5. Did the passage of Public Law 103-270 on June 20, 1994 validly renew the independent counsel statute where Congress did not reenact the entire law but merely changed the effective dates of a prior statute which had by its own sunset terms already expired?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eighth Circuit were Herby Branscum, Jr., Herby Branscum, Jr., P.A., Robert M. Hill, Robert M. Hill, P.A. and the Perry County Bank.

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PETITION FOR WRIT OF CERTIORARI

Herby Branscum, Jr. and Herby Branscum, Jr., P.A., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 15, 1996.

CITATION TO OPINION BELOW

The opinion in the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is reported at 78 F.3d 1307 (8th Cir. 1996). It is reprinted in Appendix A ("App. A") at page A-1. By order filed June 3, 1996, the Eighth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B., B-1. Since the Eighth Circuit made specific reference to its decision in a challenge made by certain other individuals prosecuted by Kenneth W. Starr, that opinion is included in Appendix C at page C-1. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), *reh'g and reh'g denied en banc* (1996).

JURISDICTION

On September 8, 1995 a district court in the Eastern District of Arkansas issued an order pursuant to 28 U.S.C. § 1826(a) finding Herby Branscum, Jr. and Herby Branscum, Jr., P.A., in civil contempt of orders of the court issued on August 17, 1995 and August 25, 1995. Notice of Appeal of those orders was timely filed on September 8, 1995 to the Court of Appeals for the Eighth

Circuit which affirmed in an opinion filed on March 15, 1996. On June 3, 1996 the Eighth Circuit denied the timely filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Because of the volume, the statutes involved in this case are reproduced in a separately bound Appendix filed jointly with Petitioner Robert M. Hill. App. A-I.

STATEMENT OF THE CASE

On August 5, 1994, the Special Division of the Court of Appeals for the District of Columbia, issued an Order pursuant to 28 U.S.C. § 593(b) appointing Kenneth W. Starr as independent counsel. The Court granted Mr. Starr the power to investigate and prosecute:

> any individuals or entities . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994). App. E-1.

In addition, the Court provided that:

> [t]he Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by *any person* or entity *developed during the* Independent Counsel's *investigation* referred to above *and* connected with or *arising out of that investigation*.

Id. at 2 (emphasis added). App. E-2.

On June 21, 1995, the Attorney General, acting on a request from Independent Counsel, referred prosecutorial jurisdiction to him over:

> [w]hether any person committed any crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign.

App. F-3.

On June 28, 1995, the Office of Independent Counsel ("OIC") served grand jury subpoenas *duces tecum* on Herby Branscum, Jr. and Herby Branscum, Jr., P.A., a professional association through which Mr. Branscum practices law. The subpoenas sought documents evidencing contributions by Mr. Branscum, his professional association, certain relatives and the Perryville Abstract Company, Inc., to the 1990 William Jefferson Clinton

gubernatorial campaign and Mr. Clinton's 1992 presidential campaign. The subpoenas also requested documents evidencing transfers of funds from Mr. Branscum and his professional association to the same relatives and the abstract company. On July 14, 1995, motions to quash or modify the subpoenas were filed by Mr. Branscum and his professional association challenging the validity of the prosecutorial jurisdiction given to Mr. Starr and his power to act.

On July 21, 1995, OIC made Application for Order of Referral of Jurisdiction of Independent Counsel to the Special Division of the United States Court of Appeals for the District of Columbia over the matters covered in the letter from the Attorney General on June 21, 1995 which was granted one week later. App. G-1.

On August 17, 1995, the district court entered a sealed order denying the motions to quash or modify the subpoenas. App. D-1.

On August 22, 1995 the Office of Independent Counsel moved for an order compelling production of the documents called for by the subpoenas by a date certain. Mr. Branscum and his professional association then filed on August 23, 1995, a Motion for Reconsideration, Clarification, and Supplemental Motion to Quash Subpoenas, which was denied in an order filed on August 25, 1995, by the district court. App. D-12. In the same order, the Court granted the OIC's motion regarding production of the documents and ordered delivery of the documents called for by the subpoenas by August 31, 1995 to the Office of Independent Counsel as agent for the grand jury. When delivery of the documents did not occur, OIC

filed an Affidavit in Support of Application for Order to Show Cause dated September 1, 1995. The district judge issued a show cause order on September 5, 1995.

A hearing was held before the district court on September 8, 1995, and the court found Mr. Branscum and his professional association in civil contempt of the court's August 17 and August 25, 1995 orders. App. D-14. The order gave them until September 15, 1995 to purge themselves of their contempt by complying with the subpoenas *duces tecum*. The court further ordered that after September 15, 1995, contempt sanctions of $1,000 per day were imposed against Herby Branscum, Jr. and Herby Branscum, Jr., P.A., for noncompliance. The court also denied the Appellants' Motion to Stay Imposition of Contempt Sanctions.

On September 15, 1995, Herby Branscum, Jr. fully responded to the grand jury subpoena *duces tecum* by producing documents in his possession. However, Herby Branscum, Jr., P.A., continued its noncompliance with the court's order. On September 8, 1995, Notice of Appeal was timely filed appealing from the court's orders of August 17, August 24 and September 8, 1995.

On December 5, 1995 the district court ordered Herby Branscum, Jr., P.A., to pay $77,000 as contempt fines through December 1 into the registry of the court. This fine was paid and the subpoena was fully complied with on December 5.

In affirming the district court, the Eighth Circuit held that the Attorney General's decision to refer related matters to independent counsel is not subject to judicial review and that the additional referrals to independent

counsel were proper without a recusal determination. App. A-1. It further ruled that the broad grant of prosecutorial jurisdiction did not violate the Appointments Clause and Article III, that the passage of Public Law 103-270 validly reenacted the independent counsel law and that the affidavit required under 5 U.S.C. § 3332 was not a condition precedent to Mr. Starr taking office.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION UPHOLDING THE CONSTITUTIONALITY OF THE BROAD SCOPE OF PROSECUTORIAL JURISDICTION GIVEN INDEPENDENT COUNSEL IS IN DIRECT CONFLICT WITH *MORRISON V. OLSON.*

The decision below is in direct conflict with this Court's ruling in 1988 which held that the statute under which independent counsel is appointed does not violate Article III or the Appointments Clause. *Morrison v. Olson,* 487 U.S. 654 (1988). In that case, the Special Division empowered the:

> independent counsel to investigate whether the testimony of . . . Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law.

Id. at 667.

In addition, the Special Division ordered that the independent counsel:

> shall have the jurisdiction to investigate any other allegation of evidence of violation of any

> Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation. Order, Div. No. 86-1 (CADC Special Division, April 23, 1986).

Id. at 667. The Supreme Court ruled that this original grant of jurisdiction to independent counsel was broad enough to cover investigation of any persons who may have aided and abetted or conspired with Olson in connection with Olson's testimony. *Id.* at 668. Thus, the prosecutorial jurisdiction given to independent counsel at issue in *Morrison* was clearly limited to a definite subject area, i.e., Olson's testimony and the revision thereof and to a definite group of persons, i.e., Olson and those who may have aided or abetted or conspired with him concerning his testimony.

In *Morrison,* this Court stated that:

> we do not think that Congress may give the Division unlimited discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly 'incidental' to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

Id. at 679. Thus, in order to pass constitutional muster under *Morrison,* as applied to the facts of this case, the scope of Mr. Starr's jurisdiction "must be demonstrably

related to the factual circumstances" of Mr. McDougal's and Clintons' relationships with Madison Guaranty, Whitewater or Capital Management, since those are the factual circumstances which gave rise to the request for the appointment of independent counsel in this case. Mr. Branscum and his professional association had no connection in any way whatsoever related to these relationships with Madison Guaranty, Whitewater or Capital Management. Likewise, the documents sought by the grand jury subpoenas in question were not in any way factually related to Mr. McDougal's or the Clintons' relationships with Madison Guaranty, Whitewater or Capital Management. Failing that test, the extension of power to Mr. Starr to investigate any person for any federal allegation which arises out of his investigation violates the teaching of *Morrison* and thus violates Article III and the Appointments Clause of the Constitution. Therefore, Mr. Starr's jurisdiction under the August 5, 1994 Order is only valid with regard to Mr. McDougal's and the Clintons' relationships with Madison Guaranty, Whitewater or Capital Management and those persons under investigation as aiders and abettors or co-conspirators regarding those specific subject matters as authorized under *Morrison*. Accordingly, Mr. Starr had no prosecutorial jurisdiction to cause the issuance of the subpoenas in question.

II. THE CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE JUDICIAL REVIEW OF THE ATTORNEY GENERAL'S REFERRAL DECISIONS UNDER THE INDEPENDENT COUNSEL STATUTE

The circuit court held that a related matter referral under 28 U.S.C. § 594(e) by the Attorney General is not subject to judicial review. The reviewability of the Attorney General's decision to refer as a matter related to the independent counsel's prosecutorial jurisdiction under 28 U.S.C. § 594(e) had never before been addressed by any court and it is not addressed by Congress in the Act.

The court noted two cases for this position, both of which are inapposite. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) involved a suit by a member of Congress and two private citizens over the Attorney General's decision to *not* conduct a preliminary investigation of a particular allegation. The Court ruled that private citizens lacked standing to challenge that action. *Id.* at 823. Likewise, *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984), held that:

> Congress specifically intended in the Ethics in Government Act to preclude judicial review, at the behest of members of the public of the attorney General's decisions *not* to investigate or seek appointment of an independent counsel with respect to officials covered by the Act.

Id. at 1168 (emphasis added). Thus, both cases dealt with cases brought by private citizens seeking to challenge decisions of the Attorney General to *not* conduct a preliminary investigation. Neither case dealt with the situation before this Court, i.e., the reviewability of the Attorney General's decision of whether a particular

investigation is a matter related to the proper scope of prosecutorial jurisdiction granted to independent counsel by the Special Division when raised as a "just cause" defense to a finding of contempt under 28 U.S.C. § 1826.

28 U.S.C. § 592(3)(f) only provides that "[t]he Attorney General's determination under this chapter to apply to the division of the court for the *appointment* of an independent counsel shall not be reviewable in any court." (emphasis added). Of course, if the Attorney General believes that information received by her does not warrant even a preliminary investigation, § 592(3)(f) would appear to cover that decision since *ipso facto* that determination would mean that there is no need to apply for independent counsel. Similarly, if the Attorney General received information, undertook the preliminary investigation and then decided to not apply for independent counsel, the provisions of § 592(3)(f) precluding judicial review would clearly apply.

The Eighth Circuit also referred to the Conference Report of the 1987 Amendment, in support of its ruling that the determinations of the Attorney General regarding related matters jurisdiction are not subject to judicial review. However, a careful reading of the examples set forth in the Conference Report to the 1987 Amendment reveals that none were in the context of a just cause defense to a contempt and all involved decisions by the Attorney General regarding the appointment of an independent counsel which are now codified in § 592(3)(f). The examples used by the committee were (1) whether to investigate a person under § 591(c), (2) whether to exercise recusal from a case and (3) whether to require appointment of an independent counsel. Judicial review

of a § 594(e) referral decision raised as a defense in a civil contempt case was not addressed by the Committee. H.R. Conf. Rep. No. 452, 100th Con., 1st Sess. at 22.

In fact, other provisions of law specifically grants review of an agency decision and allows the reviewing court to –

> hold unlawful and set aside any agency action, findings, and conclusions found to be:
>
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (b) contrary to constitutional right, power, privilege, or an immunity;
>
> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . .

5 U.S.C. § 706. As discussed, the actions of the Attorney General at issue here under § 594(e) are claimed to be unconstitutional, arbitrary, not in accordance with law and in violation of statutory jurisdiction and authority and as such those actions are reviewable by a court. *Wade v. United States*, 504 U.S. 181 (1992) (holding that prosecutor's discretion is subject to constitutional limitations). To construe § 594(e) and § 592(3)(f) otherwise would quite literally leave a contemnor without any due process to challenge the prosecutorial jurisdiction of independent counsel to defend himself in a contempt proceeding by demonstrating a "just cause" defense under 28 U.S.C. § 1826 for disobedience to the Court's order.

The right of a subpoenaed party to challenge the authority of a prosecutor who initiated a grand jury subpoena has been clearly recognized where that person

has been held in contempt for failing to comply with the subpoena. In *DiGirlomo v. United States*, 520 F.2d 372 (8th Cir. 1975), the Appellant was held in contempt for refusing to obey a court order to comply with a grand jury subpoena. His defense was based on the fact that he had "just cause" under 28 U.S.C. § 1826(a) for this refusal because the special attorneys issuing the grand jury subpoenas were not properly authorized to do so. The court allowed the Appellant to raise this argument regarding the lack of authority on appeal as a defense to the contempt. The same procedural sequence and the same category of issues which were involved in *DiGirlomo* are present here.

The Supreme Court has also explicitly recognized a contemnor's ability to raise issues like the present ones after being held in contempt. As it noted:

> If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

United States v. Ryan, 402 U.S. 530, 532-33 (1971). Another Court of Appeals correctly summarized the procedure as follows:

> Thus, under the statutory structure now in place, a witness may raise in contempt proceedings before the district court defenses amounting to 'just cause' for noncompliance with the court's order. The witness may then secure appellate review of an adverse ruling.

> In the context of a subpoena *duces tecum*, we believe the teaching of *Ryan* is that the witness has 'just cause' when compliance would be 'unduly burdensome or otherwise unlawful.' *Ryan*, 402 U.S. at 532, 91 S.Ct. at 1582; *see also In re Brummitt*, 608 F.2d 640, 643 (5th Cir. 1979). In addition, it seems to us that the claim that a subpoena was applied for and issued under the signature of unauthorized persons would constitute a cognizable claim of undue burden or unlawfulness under *Ryan*. We are therefore convinced that appellant's argument satisfied the 'just cause' requirement set out in section 1826 for defenses that may be interposed in contempt proceedings and on appeal from orders of contempt.

In re Sealed Case, 827 F.2d 776, 778 (D.C. Cir. 1987). Other Circuits have likewise recognized the standing to raise these issues on appeal after a finding of contempt. *In re Grand Jury Subpoena Served Upon Niren*, 784 F.2d 939, 941 (9th Cir. 1986) ("appellate jurisdiction to review the denial of a motion to quash does not lie unless and until the witness has been held in contempt."); *In re Paul Perlin*, 589 F.2d 260 (7th Cir. 1978), *reh'g denied and reh'g denied en banc* (1978) (power of Special Attorney considered in appeal of contempt).

In addition to raising serious due process questions, a construction of 28 U.S.C. § 594(e) and § 592(3)(f) which precludes any judicial review of a related matter referral by the Attorney General would totally emasculate other provisions of the Act. If this were the law, all that would be needed is a nonreviewable decision by the Attorney General to refer investigation of anybody for anything to independent counsel regardless of whether the original

grant of prosecutorial jurisdiction was constitutional, regardless of whether the matter referred was "demonstrably related" under *Morrison* to the proper prosecutorial jurisdiction of independent counsel, and regardless of whether the other provisions of the Act were complied with.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE PREREQUISITES IMPOSED ON THE ATTORNEY GENERAL UNDER THE INDEPENDENT COUNSEL STATUTE PRIOR TO REFERRING A NON-COVERED PERSON TO INDEPENDENT COUNSEL

At the outset of this discussion, it must be noted that the Independent Counsel Reauthorization Act of 1994 ("the 1994 Act") 28 U.S.C. § 591, *et seq.*, (App. I-9) clearly delineates certain individuals who are covered by the statute. Included within the coverage are the President, Vice-President, certain high ranking individuals in the office of the President, high ranking Assistant Attorney Generals, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the IRS, the Chairman and Treasurer of the principal national campaign committee for the election and re-election of the President and any officer of that committee excising authority at the national level during the incumbency of the President, Cabinet members and other individuals serving in positions listed in 5 U.S.C. § 5312.[1] 28 U.S.C.

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[1] The individuals covered by this statute are the Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney

§ 591(b). Clearly, Mr. Branscum and his professional association are non-covered persons since neither is automatically covered by the specific terms of the Act. 28 U.S.C. § 591(b), 5 U.S.C. § 5312. Accordingly, the only possible way by which Mr. Branscum or his professional association can be investigated by independent counsel is the procedure provided for in 28 U.S.C. § 591(c).

Under these provisions, in order to empower an investigation by an independent counsel of a person not listed in § 591(b) two requirements must be met. First, the Attorney General must receive "information sufficient to constitute grounds to investigate" whether a non-covered person may have violated any federal criminal law other than a violation of a Class B or C misdemeanor or an infraction. 28 U.S.C. § 591(c)(1). Second, the Attorney General must determine that the investigation or prosecution of that person with regard to the information received by the Attorney General or other officer of the Department of Justice could "result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c)(2). There was no such determination by the Attorney General that an investigation or prosecution of Herby Branscum, Jr. or his professional association "may result in a personal, financial or political conflict of interest" for her. Accordingly, the requirement of 28 U.S.C. § 591(c)(2)

General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Special Representative for Trade Negotiations, Secretary of Energy, Secretary of Education. 5 U.S.C. § 5312.

clearly was not met. Without that determination the independent counsel mechanism cannot be triggered to investigate those who are otherwise non-covered persons under the Act.

Even if one assumed that both of the above requirements of § 591(c) had been satisfied, there is another clear statutory problem with the attempted invocation of the Act with regard to Mr. Branscum and his professional association. Section 591(c) requires that the Attorney General conduct a "preliminary investigation in accordance with § 592" if the two (2) requirements of § 591(c) noted above are satisfied in order to then determine if a referral to independent counsel is warranted under § 594(e). Since Herby Branscum, Jr. and his professional association are non-covered persons under the Act, the requirement of a preliminary investigation under § 591(c) by the Attorney General prior to any referral to independent counsel under 28 U.S.C. § 594(e) is mandatory. In other words, the provisions of § 594(e) must be read in conjunction with § 591(c) and § 592.

Subsequent to the Special Division's initial grant of authority on August 5, 1994, the Attorney General's office issued a letter dated September 2, 1994 to independent counsel referring matters as related to the prosecutorial jurisdiction granted independent counsel on August 5, 1995. App. F-1. The September 2, 1994, letter referenced above was issued by the Acting Assistant Attorney General of the Department of Justice and stated that jurisdiction over "[w]hether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank" was referred to OIC as a related matter under 28

U.S.C. § 594(e). App. F-1.[2] Then on June 21, 1995, a letter from the Assistant Attorney General of the Department of Justice to OIC stated that "[a]fter reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that this matter is related to one of the matters referred to you by the Department of Justice on September 2, 1994 and that referral to your office would be appropriate." App. F-3. The letter went on to refer under § 594(e) "[w]hether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign." App. F-3.[3]

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[2] On December 19, 1994, the Special Division acting on an Application for Order of Referral and Order of Jurisdiction of Independent Counsel granted related matter jurisdiction to Mr. Starr pursuant to 28 U.S.C. § 594(e) to determine "[w]hether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank." App. H-1.

[3] On July 28, 1995, the Special Division acting on an Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed on July 21, 1995 granted related matter jurisdiction to Mr. Starr under § 594(e) to determine "[w]hether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign and "[w]hether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank." (App. G-1). Since this order came over one month after the subpoenas at

It is respectfully submitted that these attempted referrals of related matter jurisdiction is not, in fact, related to the constitutionally proper scope of independent counsel's jurisdiction as defined in the Order of August 5, 1994 but a naked attempt to expand Mr. Starr's jurisdiction to other areas without compliance with the requirements of § 591(c) and § 592 discussed above and without complying with § 593(c)(2).

In *Morrison*, the Supreme Court stated that "[i]n our view, this provision (§ 594(e)) does not empower the court to expand the original scope of the counsel's jurisdiction, that may only be done upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) authorizes the court simply to refer matters that are 'relate[d] to the independent counsel's prosecutorial jurisdiction' as already defined." *Morrison* at 680. Since the "already defined" jurisdiction of Mr. Starr in the August 5, 1994 order was only constitutionally proper as to Mr. McDougal's and the Clintons' relationships to Madison Guaranty, Whitewater and Capital discussed above, the attempt to include jurisdiction over the 1990 Clinton gubernatorial campaign accounts at the Perry County Bank and the political campaign contributions by Mr. Branscum in 1990 and 1992 are *not* "related matters," but rather is an attempt to expand the original scope of independent counsel's jurisdiction in violation of *Morrison* and § 593(c).

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issue were served, it, of course, cannot serve as any authority for OIC to issue the subpoenas.

Section 593(c) sets forth the proper method of expanding the jurisdiction of independent counsel. If independent counsel receives information about potential criminal law violations not covered by the original prosecutorial jurisdiction, the information must first be submitted to the Attorney General. 28 U.S.C. § 593(c)(2). The Attorney General then must conduct a preliminary investigation of the information as provided in § 593(c)(1). Only if "the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted" shall she request that the Special Division expand the jurisdiction of independent counsel. 28 U.S.C. § 593(c)(2)(C). The preliminary investigation and reasonable grounds finding by the Attorney General are mandatory. *In re Meese*, 907 F.2d 1192, 1197 (D.C. Cir. 1990). As the *Meese* Court held, "[a]s we interpret the statute, there must be a determination by the Attorney General that the 'reasonable grounds' requirement is satisfied before a valid investigation of an added official can be referred to an existing independent counsel." *Id.* at 1197. It is clear from the referral letters above that these requirements of § 593(c) were not complied with. Because of these reasons, the attempted referrals by the Attorney General on September 2, 1994 and on June 21, 1995 and the Order of December 19, 1994 are invalid and the issuance of the subpoena in question was beyond the proper prosecutorial jurisdiction of independent counsel.

Clearly also, from the letters of September 21, 1994 and June 21, 1995 the Attorney General did not make the recusal determination as required and did not conduct an independent preliminary investigation, but instead simply reviewed information presented to it by OIC. It is

respectfully submitted that this review does not comport with the clear requirements of the preliminary investigation which is required under § 591(c) and § 592. As the *Meese* court noted:

> Rather, the addition of Edwin Meese III as a new targeted subject of an existing independent counsel investigation began as a result of a *referral* by letter to Independent Counsel McKay who was already investigating Nofziger's role in Wedtech. That *investigative* jurisdiction over an additional targeted *individual subject* was being requested and obtained *by referral*, however, did not eliminate the necessity for compliance with the requirement of Sec. 592(c)(1) that there be a preliminary investigation and finding of reasonable grounds to believe that further investigation or prosecution of the targeted official, as a subject of the investigation, was warranted.

Id. at 1197.

IV. THIS CASE PRESENTS AN IMPORTANT CASE OF FIRST IMPRESSION AS TO WHETHER THE STATUTORY REQUIREMENT THAT A SWORN AFFIDAVIT BE FILED STATING THAT THE APPOINTMENT HAS NOT BEEN PURCHASED IS A CONDITION PRECEDENT TO BECOMING EMPOWERED WITH THE POSITION

Kenneth W. Starr did not comply with the explicit provisions of 5 U.S.C. § 3332 until on or after August 29, 1995 when Mr. Starr executed the required affidavit and filed it with the Special Division. The Circuit Court ruled that Mr. Starr's appointment was effective on August 9,

1994 when only the general oath required by 5 U.S.C. § 3331 was administered to him by the Special Division. This construction of 5 U.S.C. § 3332 is contrary to (1) United States Supreme Court's explicit recognition of the power of Congress to impose conditions precedent upon an appointee before investiture of the office is accomplished, *U.S. v. LeBaron*, 60 U.S. (19 How.) 73 (1856), (2) the clear and mandatory requirements of the statute, and (3) legislative history regarding this provision.

In 1856, the Supreme Court in *LeBaron* addressed the issue of when a person becomes invested with an office. The narrow issue in that case was whether or not a bond which was required to be filed before a postmaster entered an office could have the effect of relating back to the date of appointment rather than from the time of its acceptance by the Postmaster General. The Supreme Court decided that issue by holding that the bond is valid only "from the time when it reached the Postmaster General, and was accepted by him." *Id.* at 77. However, in addition, the Supreme Court noted that:

> when a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to the office is complete. *Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office;* but they are to be performed by the appointee, not by the executive; all the executive can do to invest the person with his office has

> been completed when the commission has been signed and sealed; and *when the person has performed the required conditions, his title to enter on the possession of the office is also complete.*

Id. at 78 (emphasis added). Thus, under *LeBaron* it is clear that Congress can require that "conditions precedent to the complete investiture" be imposed on an appointee.

5 U.S.C. § 3331 states that "an individual, except the President, elected or appointed to an office of honor or profit in the civil service or the uniformed services, shall take the following oath . . . " However, § 3331 also provides that "this section does not affect other oaths required by law." 5 U.S.C. § 3332[4] provides that:

> an officer, within 30 days after the effective date of his appointment, *shall file with the oath of office required by § 3331* of this title, an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment (emphasis added).

Under the express terms of 5 U.S.C. § 2104(a)(1)(B) this section clearly applies to Kenneth W. Starr, a fact acknowledged by him when he filed the special oath required by § 3332 over 385 days after his appointment. Thus, the special oath required of § 3332 is another oath "required by law" noted in § 3331 and it applies to Mr. Starr.

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[4] This provision was previously located in 5 U.S.C. § 21(a) and was made a requirement of public office by the Act of December 11, 1926, Pub. L. No. 69-526, 44 Stat. 918 (codified as amended at 5 U.S.C. § 3332).

Furthermore, examination of the congressional history of the language of this statute clearly shows that Congress intended the affidavit required under § 3332 to be a special oath required of individuals appointed to public office. In discussing this section, a Senate report noted the following:

> The purpose of this section is to change the requirements for filing of the special oath required of persons appointed to public office.
>
> Under present law, Act of December 11, 1926, 44 Stat. 918, as amended, 5 U.S.C. § 21(a) each person appointed as a civil officer of the United States by the President, by and with the advice and consent of the Senate, or by the President alone, or by a court of law, or by the head of a department, is required to file with the Comptroller General an affidavit to the effect that no consideration was paid for his appointment. The Act prohibits payment of salary to any person until such oath has been filed." 5 U.S.C. § 21(b).
>
> * * *
>
> This section would permit the special oath required of appointive officers mentioned above to be retained in the agency files where it would be available for use in the audit of payrolls in the same manner as is the general oath required of all officers. This would obviate the necessity for having different types of oaths for the same officer filed in different places and would permit the use of a form on which both oaths could be combined in cases where both are required of one person.

S. Rep. No. 2495, 81st Cong., 2d Sess. (1950) *reprinted in* 1950 U.S. Code Cong. & Ad. News 369, 3879-3880.

The law is clear that until the special oath under § 3332 has been filed with the general oath required by § 3331, the appointee may not be paid. 5 U.S.C. § 5507 states that "[a]n officer required by § 3332 of this title to file an affidavit may not be paid until the affidavit has been filed." This provision reflects explicit recognition that until the special oath of § 3332 has been executed and filed, the appointee has not been invested with the office and, of course, cannot therefore be paid.

It is thus clear by this legislative history that the intent of Congress was to require persons appointed to public office to execute *both* the general oath presently contained in § 3331 and the special oath presently contained in § 3332 as "conditions precedent" to being invested with the power of the office as specifically recognized by the Supreme Court in *LeBaron*. Further evidence that these oaths are "conditions precedent" is the unequivocal requirement that a person appointed to public office may not be paid until the special oath in § 3332 has been filed with the oath of § 3331. 5 U.S.C. § 5507. This requirement is logical since a person is not empowered with the appointed office until the special oath of § 3332 has been taken and he should not be entitled to payment until that time.

In summary, it is clear that the only oath administered to Mr. Starr on August 9, 1994 by the Special Division was the general oath required under § 3331. The required special oath under § 3332 was not taken until 385 days later. Since both oaths are conditions precedent to Mr. Starr's investiture as Independent counsel, he did not have the power and authority to cause the subpoenas in question to be issued and they are thus void.

V. THIS CASE RAISES AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE VALIDITY OF THE CURRENT LAW GOVERNING INDEPENDENT COUNSEL

The Independent Counsel Reauthorization Act of 1994 (P.L. 103-270 – "the 1994 Act") did not operate to validly reenact the provisions of the Independent Counsel Reauthorization Act of 1987 (P.L. 100-191 – "the 1987 Act") which expired on December 15, 1992 except as to then ongoing actions.

Section 599 of the 1987 Act provided as follows:

> This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determine such matters have been completed.

P.L. 100-191 (December 15, 1987). App. I-1. Thus, on December 15, 1992 the Independent Counsel law expired by its very own sunset terms except as to independent counsel actions in effect at that time. In an effort to revive the law, Congress only amended the effective dates of the 1987 Act as opposed to reenacting the entire statute. App. I-45. Thus, the issue before the Court is whether Congress can validly revive a statute which has unquestionably expired merely by amendment of the expired statute's effective date. It should be observed that since its passage in 1978, the provisions governing independent counsel had never been allowed to expire until 1992. In 1987, even

though the previous statute had not expired, the entire statute was reenacted. It is respectfully submitted that because of the express language of the 1987 Act, the statute died on December 15, 1992 as to any new Independent Counsel appointments and was not validly renewed by P.L. 103-270. Accordingly, all of the actions of Mr. Starr taken as independent counsel are void.

In addition, the provisions of the 1987 Act which Congress sought to reenact are invalid because of violation of separation of powers and Article I of the Constitution since it impermissibly attempts to assign a clear legislative function, i.e., the time period during which a statute is valid without any guidance from it, to the Executive branch. As noted above, the 1987 Act stated that:

> this chapter shall continue in effect with respect to then pending matters before an Independent Counsel that in the judgment of such counsel require such continuation until that Independent Counsel determines such matters have been completed.

P.L. 100-191 (December 15, 1987). App. I-44. The Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. App. I-1. From this language, the nondelegation doctrine has originated: that Congress may not constitutionally delegate its legislative power to another branch of government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Supreme Court has set the delegation standard clearly:

> So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' (*citing J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 396, 409 (1928).

Id. at 372. However, the quoted language above in the 1987 Act assigns a purely legislative function without providing any legislative guidance to the Executive branch since it is purely discretionary with independent counsel as to how long the provisions of the 1987 Act should be continued. As such, those provisions clearly violate Article I and the separation of powers doctrine and are invalid. Thus, the substantive provisions of the 1987 Act which Congress sought to revive in the current law governing independent counsel are invalid and all actions taken by Mr. Starr are invalid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

ROBERT M. HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

HERBY BRANSCUM, JR., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 95-3279/95-3282

In re: Grand Jury Subpoenas Duces Tecum.	* Appeals from the United * States District Court for * the Eastern District of * Arkansas.

Submitted: December 12, 1995

Filed: March 15, 1996

Before BOWMAN, BEAM, and LOKEN, Circuit Judges.

BEAM, Circuit Judge.

Appellants Herby Branscum, Jr. (Branscum), Herby Branscum, Jr., P.A.[1] (Branscum P.A.), Robert M. Hill (Hill), Robert M. Hill, P.A.[2] (Hill P.A.), and Perry County Bank appeal the district court's[3] orders refusing to quash grand jury subpoenas duces tecum served upon them by

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[1] Herby Branscum, Jr., P.A. is the professional association in which Herby Branscum, Jr. practices law.

[2] Robert M. Hill, P.A. is the professional association in which Robert M. Hill previously practiced accounting.

[3] The Honorable Stephen M. Reasoner, United States District Judge for the Eastern District of Arkansas.

the Office of Independent Counsel and holding them in contempt for failing to comply with those subpoenas. We affirm.

I. BACKGROUND

This appeal arises out of a grand jury investigation conducted by the Office of Independent Counsel (OIC) into what has become known as "Whitewater." On August 5, 1994, the Special Division of the United States Court of Appeals for the District of Columbia appointed Kenneth W. Starr as Independent Counsel pursuant to 28 U.S.C. § 593(b). Starr's task was to investigate possible violations of federal criminal law, "relating in any way to James B. McDougal's, President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." Starr was given jurisdictional authority to investigate "other allegations" and violations "by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation."

In the course of its investigation, the OIC uncovered information involving allegedly improper contributions to then-Governor Clinton's 1990 gubernatorial reelection campaign and his 1992 presidential campaign by the appellants and/or those agencies with which they were affiliated. Subsequently, grand jury subpoenas requesting

papers and documents containing information regarding these contributions were issued on June 27, 1995.[4]

In July 1995, the appellants moved to quash the subpoenas. The district court denied the motions on August 17. On August 22, the OIC asked the district court for an order to compel the production of documents by the appellants. Meanwhile, the appellants moved for reconsideration of the district court's August 17 order and again asked the court to quash the subpoenas. On August 24, the district court denied the renewed request to quash the subpoenas and granted the OIC's motion compelling the production of documents. The appellants were ordered to comply with the subpoenas by August 31.

As of August 31, the appellants had still not complied with the subpoenas. In its September 8 order holding the appellants in contempt, the district court allowed them until September 15 to purge themselves of their contempt. As of that date, fines of $1,000 per day against the individuals and $5,000 per day against the bank were to accrue. The appellants immediately appealed the September 8 order alleging that the district court erred in refusing to quash the subpoenas.

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[4] The Hill and Branscum subpoenas, served upon them in both their individual and professional capacities, requested information regarding contributions to the 1990 and 1992 campaigns made by either themselves or their relatives. The subpoenas also requested information regarding transfers of funds to certain persons, mostly relatives. The subpoenas served upon the Perry County Bank requested information regarding expenses incurred between 1990 and 1993 and monthly account statements for the other appellants and their relatives.

The appellants moved for, but were denied, a stay of the imposition of contempt sanctions pending appeal. Hill P.A., Branscum, and Perry County Bank complied with the subpoenas prior to the accrual of fines. However, because Hill and Branscum P.A. remained in contempt on September 15, they were fined $1,000 per day for their noncompliance.

On December 5, the district court issued an order requiring Hill and Branscum P.A. (the contemnors) to pay into the court registry the sum of $77,000, representing the contempt fines which had accrued through December 1, 1995.[5] The contemnors paid their fines and complied with the subpoenas on December 5. There is no indication in the record that the contempt order against these two contemnors has been purged. Appellants appeal the district court's orders dated August 17, 24 and September 8.

II. DISCUSSION

A. Mootness

As a threshold matter, we must determine whether the appellants' compliance with the subpoenas at issue renders this appeal moot. We hold that it does not.

The appellants argue that the OIC should be estopped from arguing mootness due to prior representations by the OIC that their compliance would not moot

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[5] Apparently, the fines which accrued between December 1 and December 5 remain unpaid.

the appeal.[6] Even if the appellants' allegations are true, however, parties cannot agree to jurisdiction if none exists. If the case were moot, Article III would divest this court of jurisdiction and any representations to the contrary by the OIC would not alter that outcome.

The "existence of a live case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts." *In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d 1096, 1099 (10th Cir. 1994) (citation omitted) (holding appeal of district court's denial of motion to quash subpoena was not moot due to compliance with subpoena because the court retained the authority to order improperly obtained materials returned or destroyed), *cert. denied*, 115 S. Ct. 1957 (1995). Consequently, federal courts have no authority to render decisions upon moot questions. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992).

If a party has a sufficient stake in the outcome so that the court's rendering of relief alleviates the harm complained of, the question presented is not moot. However, if during the pendency of an appeal, an event occurs which destroys the court's ability to render the prevailing party " 'any effectual relief whatever,' " the appeal must be dismissed as moot. *Id.* (quoting *Mills v. Green*, 159 U.S.

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[6] In a letter dated October 27, 1995, requesting that the contemnors be required to pay the accrued fines into the court registry, Independent Counsel Starr implied that such compliance would not moot this appeal. Similarly, a November 16 letter from Assistant Independent Counsel Timothy Mayopoulos stated that the appellants could comply with both the subpoenas and the sanctions without mooting this appeal.

651, 653 (1895)). The OIC contends such an event has occurred and that this appeal has become moot because the requested documents have now been turned over to the grand jury.[7] "In *Church of Scientology,* however, the Supreme Court rejected a similar argument, holding that the mere compliance with a summons . . . does not moot an appeal." *In re Grand Jury Subpoenas Dated December 7 and 8,* 40 F.3d at 1100 (citing *Church of Scientology,* 506 U.S. at 13).

In *Church of Scientology,* the IRS issued a summons requesting the production of two audio tapes of conversations between Church officials and their attorneys. 506 U.S. at 10. At the time the summons was issued, the tapes were being held by the clerk of court pursuant to court order. Although the Church immediately appealed the issuance of the summons, the clerk produced the tapes while the appeal was pending. Arguing for dismissal, the IRS claimed the compliance with the summons had rendered the appeal moot. The United States Supreme Court, however, held that a court's ability to render partial relief, the potential return of items wrongly obtained through the summons, prevented the controversy from

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[7] Admittedly, this argument reflects what has been the general rule, i.e., that a contemnor's compliance with a grand jury subpoena moots his ability to appeal the correctness of that subpoena. However, the United States Supreme Court's decision in *Church of Scientology of California v. United States* altered the general rule. 506 U.S. at 13. Moreover, even if this court is incorrect in applying *Church of Scientology* to these facts, the error is harmless because on the merits, we find that the act of the OIC in seeking these subpoenas was within the scope of its prosecutorial jurisdiction. *See United States v. Tucker,* No. 95-3268, slip op. (8th Cir. Mar. 15, 1996).

becoming moot. Therefore, although it was incapable of providing full relief to the Church, the Court noted that it could "effectuate a partial remedy" by ordering the return or destruction of the tapes. *Id.* at 13.

As in *Church of Scientology,* we could effectuate a partial remedy under these circumstances. For example, we could find that the subpoenas were improperly issued and that the appellants' privacy interest in their documents "plainly would be benefitted by an order requiring" the return or destruction of those documents. *Reich v. National Eng'g & Contracting Co.,* 13 F.3d 93, 98 (4th Cir. 1993) (compliance with order directing production of documents did not render appeal from that order moot because persons forced to produce documents retained privacy interest in disclosed information). *See also Church of Scientology,* 506 U.S. at 13. As a result, it is not "impossible" for us to grant "any effectual relief whatever" in this case.[8] *Church of Scientology,* 506 U.S. at 12. Therefore, the case is not moot.[9] We now turn to the merits of this appeal.

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[8] As one court stated, "We merely point out that there is a possibility of equitable relief. It is only if there is no such possibility that the appeal should be dismissed as moot." *O.J. Osborn v. Durant Bank & Trust Co.,* 24 F.3d 1199, 1210 (10th Cir. 1994). Our observation of the mere availability of this partial relief in no way implies that we find the appellants' arguments on the merits compelling. In fact, we do not.

[9] The appellants also argue that this case is not moot because it meets the "capable of repetition, yet evading review" exception to the mootness doctrine. *See, e.g., Southern Pac. Terminal Co. v. I.C.C.,* 219 U.S. 498, 515 (1911); *In re Larson,* 785 F.2d 629, 631 (8th Cir. 1986). Because we find this appeal is not moot, we need not address this argument.

B. The Merits

The appellants argue that, for various reasons, the OIC lacked authority to seek the issuance of the subpoenas in question. Appellants claim the OIC was without such power because: (1) the Attorney General improperly referred the campaign contribution matters to the OIC as matters "related" to the OIC's prosecutorial jurisdiction; (2) the Attorney General failed to conduct the necessary recusal determination prior to referring these matters to the OIC; (3) the grant of prosecutorial jurisdiction to the OIC violates the Appointments Clause and Article III of the United States Constitution; (4) the passage of Public Law 103-270 did not validly reauthorize the appointment of Independent Counsels; (5) the oaths given to Independent Counsel Starr and Assistant Independent Counsel Mayopoulos were invalid; and (6) the subpoenas violate the appellants' right of freedom of association under the First Amendment.

Issues one and two are precluded by another Whitewater case, decided concurrently with this appeal. *See United States v. Tucker*, No. 95-3268, slip op. at 5-11 (8th Cir. Mar. 15, 1996) (holding that the Attorney General's referral decisions under the Independent Counsel law are nonreviewable). Following the lead of *Tucker*, we also find appellants' "relatedness" argument unavailing. The analysis to be made is, of course, fact specific and not totally controlled by *Tucker*. We believe, however, that the campaign contribution allegations peculiar to this case are unquestionably related to both the OIC's original jurisdiction and any additional referrals by the Attorney General. In sum, if *Tucker* passes the relatedness test, then this case even more clearly passes muster in that regard.

Further discussion of issues one and two is, therefore, unnecessary. Also, as noted in the *Tucker* opinion, issue three was fully disposed of in *Morrison v. Olson*. *Tucker*, slip op. at 6 n.3 (citing *Morrison v. Olson*, 487 U.S. 654 (1988)).

Issue four concerns the reenactment of the Independent Counsel Reauthorization Act of 1987 (1987 Act). As we observed in *Tucker*, the 1987 Act was reenacted in June 1994. *Tucker*, slip op. at 3. To accomplish this, Congress passed Public Law 103-270. This enactment amended the sunset provision (28 U.S.C. § 599) of the 1987 Act by substituting the year 1994 for the year 1987, thereby providing for the 1987 Act to run for five years from 1994 instead of from 1987. Notwithstanding appellants' arguments to the contrary, this was a valid renewal of the 1987 Act. Initially, we note that the intent of Congress controls the meaning of its words. *See Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 386 (1948). Furthermore, generally speaking, "Congress may revive or extend an act by any form of words which makes clear its intention so to do." *Kersten v. United States*, 161 F.2d 337, 338 (10th Cir.), *cert. denied*, 331 U.S. 851 (1947). In amending the sunset provision, Congress made clear its intention to reenact the 1987 Act.[10] Consequently, we find

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[10] Further evidence of this intent is found in the reports of the Senate and the House of Representatives regarding the Independent Counsel Reauthorization Act of 1994. *See, e.g.*, S. Rep. No. 101, 103d Cong., 1st Sess. (1993); H.R. Rep. No. 224, 103d Cong., 1st Sess. (1993).

that the 1987 Act was validly reenacted by Congress in June 1994.[11]

Appellants also argue Starr failed to take the required oath of office. As a result of this alleged failure, the appellants challenge Starr's authority to prosecute, administer the oath to his assistant Mayopoulos, and consequently, Mayopoulos's authority to prosecute. On August 9, 1994, Starr took the oath of office as required by 5 U.S.C. section 3331. In addition to the section 3331 oath, 5 U.S.C. section 3332 required Starr to file an affidavit stating that he had not purchased the office. Starr did not complete this affidavit until August 29, 1995. Because the section 3332 affidavit requirement is not a condition precedent to Starr taking office, however, this delay did not affect Starr's prosecutorial authority during the interim. Although Congress can impose conditions on an appointee which must be satisfied before that appointee takes office, the affidavit requirement found in 5 U.S.C. section 3332 is not such a condition precedent. In support of this conclusion, we need only refer to the

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[11] Appellants also argue that such reenactment violated the separation of powers doctrine. The appellants argue that the 1987 Act's sunset provision, which permitted the discretionary continuance of ongoing Independent Counsel actions, delegated a purely legislative function (determining the duration of legislation) to an executive branch office (the OIC). Because there is no allegation that any of the Independent Counsels involved in this grand jury investigation were "carryovers" from the 1987 Act, we need not address this argument.

language of section 3332.[12] That language requires that the affidavit be filed "within 30 days after the effective date of [the] appointment." 5 U.S.C. § 3332 (emphasis added). The use of the word "after" expressly negates the claim that the filing of the affidavit is a condition precedent to Starr's execution of his duties as Independent Counsel. Thus, Starr's execution of section 3331's oath permitted him to administer the oath of office to Mayopoulos. Therefore, this challenge to the OIC's prosecutorial authority fails.

Finally, the appellants argue that the subpoenas at issue violate their First Amendment right to freedom of association by imposing a "chilling" effect on their associations with the additional persons listed in the subpoenas, including certain family members. Assuming, arguendo, that the appellants could show an infringement of their freedom of association, that showing would not complete the analysis. A grand jury subpoena will be enforced despite a First Amendment challenge if the government can demonstrate a compelling interest in and a sufficient nexus between the information sought and the subject matter of its investigation. *In re Faltico*, 561 F.2d 109, 111 (8th Cir. 1977). We agree with the district court's

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[12] Section 3332 provides:

> An officer, within 30 days after the effective date of his appointment, shall file with the oath of office required by section 3331 of this title an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment.

5 U.S.C. § 3332.

finding that the OIC met its burden in this case.[13] Therefore, the First Amendment challenge to the subpoenas fails. *See In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988); *Glass v. Heyd*, 457 F.2d 562, 564-65 (5th Cir. 1972). We have considered the remainder of appellants' arguments and find them to be without merit.

III. CONCLUSION

Having found that appellants' compliance with the subpoenas here at issue did not moot their appeal, we nonetheless find that the district court correctly refused to quash the subpoenas. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[13] Furthermore, absent "unusual circumstances," the First Amendment rarely offers protection from a duty to testify before a grand jury. *United States v. Weinberg*, 439 F.2d 743, 748 (9th Cir. 1971); *see also Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("[c]itizens generally are not constitutionally immune from grand jury subpoenas").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3279/95-3282EALR

In re: Grand Jury Subpoena Duces Tecum.

* Order Denying Petition
* for Rehearing and
* Suggestion for Rehearing
* En Banc

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

Chief Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Murphy took no part in the consideration or decision of this case.

June 3, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

64 USLW 2627

UNITED STATES of America, Appellant,

v.

Jim Guy TUCKER; William J. Marks, Sr.; John H. Haley, Appellees.

United States Department of Justice; Sun Diamond Growers of California, Amicus Curiae.

No. 95-3268.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 12, 1995.

Decided March 15, 1996.

Rehearing and Rehearing En Banc
Denied May 6, 1996, 1996 WL 225986.

Order Granting Stay May 17, 1996.

Appeal from the United States District Court for the Eastern District of Arkansas; Henry Woods, Judge.

Kenneth W. Starr, Little Rock, AR, argued, for appellant.

George B. Collins, Chicago, IL, argued (William H. Sutton and James J. Lessmeister, Little Rock, AR, on the brief), for appellee Jim Guy Tucker.

Robert E. Davis, Dallas, TX, argued (D. Randall Johnson, on the brief), for appellee William Marks.

Ted Boswell, Bryant, AR, argued (Curtis L. Bowman, Little Rock, AR, on the brief), for appellee John Haley.

Before BOWMAN, BEAM, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

The United States, represented by Independent Counsel Kenneth W. Starr, appeals from an order of the District Court dismissing an indictment brought against Jim Guy Tucker, William J. Marks, Sr., and John H. Haley. The court ruled that the Office of Independent Counsel (OIC) has no jurisdiction to prosecute the case. We reverse.

On August 5, 1994, the Division for the Purpose of Appointing Independent Counsels (commonly known and herein referred to as the Special Division), pursuant to a request from United States Attorney General Janet Reno, appointed Starr as Independent Counsel

> to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C.Cir.Sp.Div. Aug. 5, 1994) (emphasis

added).[1] The order further conferred upon Starr "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law . . . by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation." *Id.* at 2 (emphasis added). The OIC also was empowered to investigate any obstruction of justice "in connection with any investigation of the matters described above." *Id.* Finally, the Special Division vested in the Independent Counsel "jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters." *Id.* In sum, the court ordered that the Independent Counsel "shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter," including crimes "that may arise out of the above described matter." *Id.* at 3 (emphasis added).

Starr succeeded Robert B. Fiske, Jr., who had been appointed by the Attorney General in January 1994 pursuant to 28 C.F.R. Sec. 600.1 (1993) (after the 1987 statutes reauthorizing appointment of independent counsel had expired, and before the OIC was reauthorized again in

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[1] Under 28 U.S.C. Sec. 49 (1994), the Chief Justice appoints three judicial officers to serve two-year terms for this division of the United States Court of Appeals for the District of Columbia.

June 1994), both in the position and in his scope of authority as Independent Counsel. Fiske had been appointed, in turn, to replace a team of lawyers from the fraud section of the criminal division of the Justice Department, which had taken over the Madison Guaranty Savings & Loan Association investigation in November 1993 when Paula Casey, United States Attorney for the Eastern District of Arkansas, recused herself and her staff from the investigation and prosecution of matters concerning Madison Guaranty and Capital Management Services (CMS).

By letter dated September 2, 1994, the Acting Assistant Attorney General, Criminal Division, responding to Starr's August 31 request, referred to the OIC "investigative and prosecutorial jurisdiction over . . . [w]hether any person committed any federal crime relating to the bankruptcy action entitled *In Re: Landowners Management System, Inc., Tax Identification No 75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11)." The letter noted that the Attorney General had agreed that this matter, and another that was redacted from the record that is before us in this case, are related to the OIC's investigation. Letter from John C. Keeney, Acting Assistant Attorney General, Criminal Division, to Kenneth W. Starr (Sept. 2, 1994). The Independent Counsel sought referral, and the Attorney General granted it, pursuant to 28 U.S.C. Sec. 594(e) (1994), which provides, as relevant here: "An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the

division of the court, as the case may be, may refer such matters." Out of what the Independent Counsel referred to during oral argument of this appeal as "an abundance of caution," the Independent Counsel in December 1994 also sought referral jurisdiction over the investigation and prosecution of federal criminal matters relating to the Landowners Management System (LMS) bankruptcy (among other matters) from the Special Division. On December 19, the Special Division issued an Order of Referral, a paragraph of which precisely tracks the Attorney General's September 2, 1994, referral to the OIC of all investigative and prosecutorial jurisdiction over federal criminal matters relating to the LMS bankruptcy.

The OIC's criminal investigation of matters relating to the LMS bankruptcy culminated on June 7, 1995, when a grand jury for the Eastern District of Arkansas issued the indictment that is the subject of this appeal. Governor of Arkansas Jim Guy Tucker, his Little Rock lawyer John H. Haley, and his San Francisco business partner William J. Marks, Sr., were variously charged with tax fraud; bankruptcy fraud; making false material statements for the purpose of influencing CMS, a federally licensed management company in Arkansas; and conspiracy to commit various of these acts. The specifics of the indictment are discussed in further detail as necessary to the discussion in Part II of this opinion.

The case was assigned to Judge Henry Woods,[2] who on September 5, 1995, held a hearing on the defendants'

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[2] United States District Judge for the Eastern District of Arkansas.

motions to dismiss. Within a few hours, the court issued a twenty-one-page order and opinion dismissing the indictment on the ground that the OIC lacked prosecutorial jurisdiction over this case.

I.

The Independent Counsel's first issue on appeal was addressed by the District Court somewhat summarily and with little legal analysis: whether the courts have the authority to review the Attorney General's decision under 28 U.S.C. Sec. 594(e) to refer jurisdiction to the OIC. We review this question of law *de novo* and hold that the Attorney General's exercise of her discretion to refer matters to the OIC for investigation and prosecution is not reviewable.

An independent counsel, of course, is not an ordinary United States attorney. The counsel is appointed by the judiciary (the Special Division) at the behest of the Attorney General. 28 U.S.C. Secs. 593(b)(1), 592(c)(1) (1994). The scope of counsel's prosecutorial jurisdiction is delineated by the Special Division. *Id.* Sec. 593(b)(1). Counsel may be removed only by impeachment and conviction, or "by the personal action of the Attorney General and only for good cause, physical or mental disability . . . , or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* Sec. 596(a)(1) (1994). The independent counsel law specifically provides that the United States District Court for the District of Columbia has jurisdiction to review a removal decision of the Attorney General upon petition by the ousted independent counsel. *Id.* Sec.

596(a)(3) (1994). The Special Division, or the independent counsel, may terminate an OIC when an investigation and any resulting prosecutions are substantially completed. *Id.* Sec. 596(b) (1994). The independent counsel is subject to congressional oversight, *id.* Sec. 595 (1994), and must make periodic reports to the Special Division, *id.* Sec. 594(h) (1994).[3]

The unusual nature of the office notwithstanding, a duly appointed independent counsel is a prosecutor for the United States, and prosecutorial decisions of the nature here in question – who should be prosecuted and for what alleged crimes – have long been committed to the discretion of the prosecutor.[4] "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States,*

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[3] The Supreme Court has held that the independent counsel law does not violate the Appointments Clause, Article III, or the separation of powers principles of the Constitution. *Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

[4] As the Supreme Court noted in *Wayte v. United States,* 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985), a prosecutor's decisions are not free from scrutiny when the challenge is to the constitutionality of those decisions, such as selective prosecution that violates the Equal Protection Clause. *See United States v. Batchelder,* 442 U.S. 114, 125 & n. 9, 99 S.Ct. 2198, 2205 & n. 9, 60 L.Ed.2d 755 (1979). But there is no constitutional right of a criminal defendant to choose his or her prosecutor and thus there can be no constitutional dimension to the challenge to the prosecutor's jurisdiction when it is conceded, as it is here, that there is *some* federal prosecutor who is empowered to bring the charges on which the appellees have been indicted.

470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n. 11, 102 S.Ct. 2485, 2492, 73 L.Ed.2d 74 (1982)); *see also Massey v. Smith*, 555 F.2d 1355, 1356 (8th Cir.1977) (per curiam) ("The authority to decide against whom federal indictments shall be sought lies almost exclusively with the United States Attorneys or the Justice Department, and their decisions in this regard are not generally subject to judicial review.").

Although prosecutorial discretion is not the precise issue here, we do not see any reason to believe that the Attorney General's referral decision is any more subject to judicial review than the usual prosecutorial decisions. But we need not rest our decision on intuition guided by a consideration of prosecutorial discretion and its unreviewability in its ordinary contexts, for the definitive answer to the question of reviewability in this case is found in legislative history that cannot be ignored (although the appellees and the District Court elected to do just that).

In 1987, the second time legislation establishing the independent counsel process was reauthorized, the conferees discussed the possibility of codifying the holdings of *Dellums v. Smith*, 797 F.2d 817 (9th Cir.1986), and *Banzhaf v. Smith*, 737 F.2d 1167 (D.C.Cir.1984) (en banc) (per curiam) (the legislative history incorrectly referred to the case as *Banzhai v. Smith*), wherein two circuit courts of appeals "properly reflect[ed] legislative intent" by concluding "that no judicial review is available of decisions by the Attorney General not to conduct preliminary investigations." H.R.Conf.Rep. No. 452, 100th Cong., 1st

Sess. 22 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2188.[5] The joint statement explained, however, that such a provision was not included in the jointly proposed legislation "because the conferees did not wish to suggest, by indicating a lack of judicial review of Attorney General decisions on preliminary investigations, that judicial review might be available of other Attorney General decisions under this chapter." *Id.* Thus one might quite logically conclude that, where Congress did intend there to be judicial review of Attorney General decisions, it specifically ordained judicial review, as it did when providing for judicial review of an Attorney General's decision to remove an independent counsel. To be certain that its point – that unreviewability of the Attorney General's decisions is the rule when the independent counsel law does not expressly provide otherwise – was not missed, the Committee stated, in no uncertain terms that "[t]he conferees agree that an Attorney General's determinations under the independent counsel law are not subject to judicial review." *Id.* (emphasis added). The District

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[5] The court in *Banzhaf v. Smith*, 737 F.2d 1167, 1168 (D.C.Cir.1984) (en banc) (per curiam), held "that Congress specifically intended in the Ethics in Government Act to preclude judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate or seek appointment of an independent counsel with respect to officials covered by the Act." The court in *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir.1986), reached the same conclusion, noting its view, based on its reading of 28 U.S.C. Sec. 595 (1994) – the provision concerning congressional oversight of the OIC – that Congress intended "that enforcement by members of congressional judiciary committees would be effective in preventing the Attorney General from refusing to obey the law."

Court and all the appellees studiously ignore this compelling language from the legislative history, despite the fact that it was brought to their attention, evidently finding it impossible to challenge.[6] We too think it is irrefutable, and conclude that this legislative history, which confirms the conclusion one logically would reach by reading the statute, settles the question. For us to hold otherwise would subvert congressional purpose in creating and empowering the independent counsel and in structuring the office as it did.

United States v. Juvenile Male, 923 F.2d 614 (8th Cir.1991), to which the appellees direct our attention for the proposition that the Attorney General's referral is reviewable, is inapposite. In *Juvenile Male*, the issue was the reviewability of the Attorney General's decision to

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[6] In an apparent effort to avoid the illuminating legislative history concerning review of the Attorney General's decisions under the independent counsel law, the appellees urge that they are actually seeking (or, in addition, they are seeking) review of the Independent Counsel's decision to ask the Attorney General to refer, and his decision to accept referral of, the matters in question. This argument is specious. Any possible issue relating to counsel's decision to seek or to accept referral in this case is mooted by the decision of the Attorney General to refer the matters in question to the jurisdiction of the Independent Counsel. The contentions that it is the referral from the Special Division that is challenged here and that the courts may review that referral strike us as being even more specious, but in fact we need not and do not consider them. Referral by the Special Division, as noted above, was redundant and unnecessary. Given that the Attorney General has authority to make the referral independently, and did so here, the additional, identical referral by the Special Division, though it may be a source of additional comfort to the OIC, is a moot point in this appeal.

certify, under the Juvenile Justice and Delinquency Prevention Act, that the crime with which a juvenile was charged was a "crime of violence." The Court held that the certification in question was reviewable. *Cf. United States v. C.G.*, 736 F.2d 1474 (11th Cir.1984) (holding certification under the Act that appropriate state court did not have jurisdiction was not reviewable); *United States v. Vancier*, 515 F.2d 1378 (2d Cir.) (same), *cert. denied*, 423 U.S. 857, 96 S.Ct. 107, 46 L.Ed.2d 82 (1975). We stated, "While this court may not have the power to guide a federal prosecutor's discretion, we must insure that the exercise of that discretion is within the confines" of the statute. *Juvenile Male*, 923 F.2d at 617-18. The argument that the Juvenile Male holding is applicable here ignores the definitive legislative history of the law reauthorizing the OIC that clearly evidences Congress's intent that (unless otherwise provided in the statute) the Attorney General's decisions under the independent counsel law are nonjusticiable. Further, the question whether a juvenile has been charged with a "crime of violence" is easily reviewed by a court and is well within the expertise of the judiciary. The "relatedness" determination at issue here, on the other hand, is an exercise of a discretion that only the prosecutor and the Attorney General command, because of their intimate knowledge of the course of the investigation, including witness statements, and of other proceedings that may be ongoing before the grand jury. That is, the "relatedness" question is largely without the standards that the judiciary typically requires for review, another reason for entrusting it, as Congress has, to the broad (and unreviewable) discretion of the Attorney General.

Reliance on *Gutierrez de Martinez v. Lamagno*, ___ U.S. ___, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995), in support of the appellees' position also is misplaced. Gutierrez was a case decided under the terms of the Westfall Act, which authorizes the Attorney General to certify that a federal employee sued for a wrongful or negligent act was acting within the scope of employment at the time of the alleged act, so that the United States is substituted for the defendant. In the ordinary case, such certification would allow a plaintiff to maintain an action under the Federal Tort Claims Act (FTCA), although because of an exception to the FTCA the result in Gutierrez was just the opposite, and the United States retained its sovereign immunity from suit. The issue in Gutierrez was the reviewability of that certification. The Court noted two factors that "weigh[ed] heavily" in its analysis: that "the Attorney General herself urge[d] review," and that review is generally available "when a government official's determination of a fact or circumstance . . . is dispositive of a court controversy." Id. at ___, 115 S.Ct. at 2231.

Neither factor is present here. In this case, the Department of Justice, as amicus curiae, agrees with the Independent Counsel that the Attorney General's referral is not reviewable. Further, as is apparent from the District Court's unchallenged acknowledgement that these defendants properly may be prosecuted by the United States Attorney for the Eastern District of Arkansas (who has recused herself from matters concerning CMS) or by the Attorney General (who made the referral to the OIC), the Attorney General's referral does not "instruct[ ] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." Id. at ___, 115

S.Ct. at 2234. The absence of judicial review of the discretionary referral decision merely allows the prosecution to proceed without the delay that judicial review inevitably would entail; it does not direct the outcome of the prosecution. Further, unlike the situation in Gutierrez, this is not a case where the Attorney General has a vested interest in the referral such that she "is hardly positioned to act impartially." Id. at ___, 115 S.Ct. at 2233.

At oral argument we were directed to the admonition of the Gutierrez Court that "judicial review of executive action 'will not be cut off.' " Id. at ___, 115 S.Ct. at 2231 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). But considering our reading of the independent counsel law and the uncontroverted legislative history we have discussed above, the full, unabridged language of the Court does not support the appellees' position, and actually supports our holding that the Attorney General's referral decisions are nonjusticiable: "Accordingly, we have stated time and again that judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' " Id. (emphasis added). It is fair to say that the "reason to believe" here is more than just "persuasive," it is beyond reasonable dispute.

Accordingly, we hold that the Attorney General's referral decision under Sec. 594(e) is not reviewable and that the District Court erred in holding otherwise.

II.

Even if the courts had jurisdiction to review the Attorney General's "relatedness" determination under

Sec. 594(e), which in Part I of this opinion we have held the courts do not have, we nevertheless would reverse the District Court, which reviewed the "relatedness" issue and disagreed with the Attorney General's determination. We begin our discussion of "relatedness" with a look at the factual basis, according to the indictment, for the charges against Tucker, Marks, and Haley.

The grand jury's indictment of June 7, 1995, was the culmination of an investigation that began on Independent Counsel Fiske's watch. The indictment alleged that Tucker and Marks made false material statements to CMS for the purpose of securing a $300,000 loan. Tucker and Marks represented to CMS that the loan was for investment in D & L Telecommunications, Inc., when in fact it was used as part of the cash collateral pledged for a personal loan of $8.5 million from Fleet National Bank. Allegedly, $6 million of that loan was used to purchase controlling interest in Planned Cable Systems Corporation (PCS), a cable television company in which Marks, who was president of the company, already was a minor shareholder. According to the indictment, Haley acquired a "shelf" corporation, that is, one with no assets or operations, in Texas, called LMS. The appellees merged PCS into LMS and Marks was named president. In November 1987, LMS filed a fraudulent bankruptcy in the Northern District of Texas. The proposed reorganization plan, approved by all creditors listed in the bankruptcy schedules before LMS even filed its bankruptcy petition, transferred valuable cable television assets to Tucker, the only secured creditor listed, and to a corporation controlled by Tucker, listed as an unsecured creditor. The indictment alleges that this scheme was undertaken to avoid paying

$4 million in taxes that would have been owed on a sale of the cable television assets.

Also relevant here is an indictment from the same grand jury handed down on August 17, 1995, after the arguments on the question of dismissal had been briefed to the District Court. The indictment charged Tucker, James McDougal, and Susan McDougal with fraudulent loan schemes involving Madison Guaranty and CMS.

As we mentioned in our discussion in Part I, "relatedness" in the context at issue here is an essentially standardless concept and, as the statute is written, one that is exceedingly broad. Section 594(e) requires only that referred matters be "related to the independent counsel's prosecutorial jurisdiction." The term "related" is undefined and without parameters. Congress did not indicate the degree of consanguinity between matters that should be evident before jurisdiction may be properly asserted by the OIC (further indication, we might add, that it was to be a determination entrusted to the discretion of the Attorney General). We also think it is relevant to note that the original jurisdiction of this OIC, which is not at issue here, includes authority "to investigate other allegations or evidence of violation of any federal criminal law . . . by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation."[7]

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[7] The appellees seem to contend in parts of their argument that the Independent Counsel is relying on "arising out of" jurisdiction, as set forth in two places in the original grant of jurisdiction, for his referral jurisdiction. *See also* 28 U.S.C. Sec. 593(b)(3) (1994) (scope of prosecutorial jurisdiction "shall also

In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 2 (emphasis added); *see also* 28 U.S.C. Sec. 593(b)(3) (1994) (scope of prosecutorial jurisdiction). Arguably, the prosecutions at issue fall within the broad grant of original prosecutorial jurisdiction without a referral even being necessary. *See United States v. Wilson*, 26 F.3d 142, 148 (D.C.Cir.1994) ("[T]he scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders."), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1430, 131 L.Ed.2d 311 (1995). Even so, the OIC sought and received a referral from the Attorney General, which set forth with specificity the additional criminal matters to be investigated and possibly prosecuted by the OIC.

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include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter"). They argue that the "arising out of" language concerns the investigation or prosecution of a crime committed as a direct result of the OIC's investigation or prosecution, that is, an obstruction of justice crime such as perjury. We need not decide whether "arising out of" as variously used in the original grant of jurisdiction should be so narrowly interpreted, as the OIC has jurisdictional authority to investigate and prosecute not only obstruction of justice crimes related to his grant of authority but also to investigate matters "developed during the Independent Counsel's investigation . . . and connected with or arising out of that investigation." *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 2 (D.C.Cir.Sp.Div. Aug. 5, 1994) (emphasis added). Further, in order to acquire referral jurisdiction over a matter, the OIC does not need to rely on either the "arising out of" or the "connected with" language to justify his request; the referred matters need only be "related." 28 U.S.C. Sec. 594(e) (1994).

Considering the open-ended phrasing of Sec. 594(e) and the expansive jurisdiction originally granted the OIC, we believe that the association between the original jurisdiction and the jurisdiction sought via referral need not be as intimate as the appellees suggest.[8] The appellees argue that the matters must be "demonstrably related" in order for referral jurisdiction to be proper. That language is excerpted from *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), wherein the Supreme Court addressed the constitutionality of the independent counsel provisions of the Ethics in Government Act. Reference to the Court's entire discussion, however, makes it clear that the Court was not delimiting "relatedness" for the purpose of referral jurisdiction. Instead, the Court was observing that, due to the temporary nature of the OIC, "the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place," Congress properly conferred upon the Special Division the authority "to define the scope of the office." Id. at 679, 108 S.Ct. at 2613. The Court went on:

> This said, we do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In

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[8] We reject the suggestion that the OIC has disavowed any relation between the indictment in this case and the Independent Counsel's original jurisdiction. We agree with the OIC that this is an obvious distortion of the Independent Counsel's position, which from the initial request for referral always has been that the matter with respect to which the OIC sought referral and the original grant of jurisdiction are indeed related within the meaning of the statute.

> order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

Id. It is clear that the limitation in question (assuming, as do the appellees, that "demonstrably related" is a genuine limitation) was upon the authority of the Special Division to define jurisdiction in the first instance, and was the result of the constitutional concerns (appointments clause and separation of powers) generated by Congress's decision to vest executive powers in the judiciary (the Special Division). "Demonstrably related" is not, as Marks asserts, "[t]he applicable legal standard for evaluating whether the Independent Counsel has authority to prosecute the instant case." Brief of Appellee Marks at 13. We do not agree that the subject matter of the referral jurisdiction must be "demonstrably related" either " 'to the factual circumstances' that give rise to the appointment," Brief of Appellee Tucker at 10, or "to the subject matter of the Independent Counsel's jurisdiction," Brief of Appellee Marks at 13.[9] We thus reject the appellees' contention that the subject matter of the referral jurisdiction is required to relate to James McDougal's or President Clinton's or Mrs. Clinton's relationship to CMS

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[9] Haley simply argues that the independent counsel law and Morrison "require that matters to be referred must be 'demonstrably related,' " Brief of Appellee Haley at 5, although to what they must be so related is not stated.

or Madison Guaranty or the Whitewater Development, which is the subject matter of the Independent Counsel's original investigatory jurisdiction. If that were the test for a proper referral, then referral never would be necessary and Sec. 594(e) would be superfluous. We think it is clear that, contrary to the appellees' arguments, relatedness for purposes of referral under Sec. 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred.

The matters over which the OIC sought referral jurisdiction were developed during the investigation conducted by the OIC under the original grants of jurisdiction, first the jurisdiction of the regulatory Independent Counsel (Fiske) and then the statutory Independent Counsel (Starr). It is apparent from the record before us, even though grand jury proceedings to which we are not privy continue, that there is overlap in witnesses and in defendants between the original prosecutorial jurisdiction (*see* August 17, 1995, indictment) and the referral jurisdiction (*see* June 7, 1995, indictment). Further, as the August 17 indictment demonstrates, there is a clearly defined relationship between Tucker (referral) and McDougal (original), Tucker (referral) and CMS (original and referral), and Tucker (referral) and Madison Guaranty (original). (CMS was an entity named in the original grant of jurisdiction and allegedly defrauded by the activities charged in the August 17 indictment, and material false statements to CMS by Tucker and Marks constitute a part of the charges in the June 7 indictment.) We

have no difficulty in concluding that the required relatedness between original and referral jurisdiction is present here.

The appellees further argue that they are not "persons" within the meaning of 28 U.S.C. Sec. 591 (1994) who can be investigated by the OIC, and therefore they cannot be prosecuted by the OIC for wrongdoing. The covered "persons" described by Sec. 591(b) are high-ranking federal executive officials and national campaign committee officers. Tucker, Marks, and Haley are outside the definition. But Sec. 591(b) refers to persons to whom Sec. 591(a) applies, and Sec. 591(a) sets out the requirement of a preliminary investigation by the Attorney General:

> The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law. . . .

Thus it is the alleged culpability of a covered "person" that may require the Attorney General to conduct an initial preliminary investigation. But the ultimate scope of jurisdiction of the OIC – whom he may investigate and whom he may prosecute – as determined by the Special Division, is not necessarily limited to covered persons, and neither is referral jurisdiction. Moreover, referral jurisdiction requires only relatedness to the original prosecutorial jurisdiction; nowhere do the OIC provisions require that a Sec. 591 preliminary investigation into the involvement of covered persons be conducted before a matter may be referred to an existing OIC. Finally, the

appellees' argument is in any event inapposite to their case, for here the Attorney General originally sought the appointment of independent counsel under 28 U.S.C. Sec. 591(c) because the investigation and prosecution would present a "political conflict of interest," not because covered persons were the targets.

The appellees also argue that the Independent Counsel was, in reality, seeking expansion jurisdiction, not referral jurisdiction, and that he did not comply with the requirements of expansion jurisdiction, or, in the alternative, that he should have sought expansion jurisdiction instead of referral jurisdiction. Expansion jurisdiction may be granted to the OIC by the Special Division upon the request of the Attorney General, if possible violations of criminal law by Sec. 591(b) "covered persons" that are outside the prosecutorial jurisdiction of the OIC come to the attention of the independent counsel. 28 U.S.C. Sec. 593(c) (1994). If, after a 28 U.S.C. Sec. 592 (1994) preliminary investigation, the Attorney General determines that further investigation is warranted, the Special Division then must either expand the existing OIC's jurisdiction or appoint another independent counsel. The argument that the Independent Counsel and the Attorney General failed to comply with the requirements of Sec. 593(c) (expansion jurisdiction) is irrelevant to this case, because in fact the Independent Counsel did not seek expansion jurisdiction. He clearly sought – and received – referral jurisdiction under Sec. 594(e), obviating any need to comply with the requirements for expansion jurisdiction. As for the contention that the Independent Counsel should have sought expansion jurisdiction in the first place, and not referral jurisdiction, our decision that referral was proper because

the referred matter is related to the Independent Counsel's prosecutorial jurisdiction renders this argument moot.

Assuming for the sake of argument that the discretion exercised by the Attorney General in referring "related" matters to the OIC is reviewable, and giving the Attorney General the deference that is due such discretionary decisions, we hold that she did not abuse her discretion in determining that the subject matter of the referral jurisdiction in this case is "related" to the Independent Counsel's original prosecutorial jurisdiction within the meaning of 28 U.S.C. Sec. 594(e). The OIC has jurisdiction to prosecute this case.

III.

We come now to the Independent Counsel's request that this case be assigned to a judge other than Judge Woods upon remand to the District Court. We conclude that this request must be granted to preserve the appearance of impartiality.

The Independent Counsel relies primarily on newspaper articles to support his request.[10] First, there are articles that connect Judge Woods and Hillary Rodham Clinton. Judge Woods appointed her as counsel for a special committee in the Pulaski County, Arkansas,

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[10] In order to adequately consider the Independent Counsel's argument for reassignment, once having determined that his request is properly ours to grant, *see infra*, we asked the OIC to supplement the record by providing to the Court copies of the articles upon which he relies.

school desegregation case, and was quoted as saying that he "did work with Hillary" and that he "came to admire her during that period." Rex Nelson, *Road to Tucker trial full of twists for Judge Woods*, Ark. Democrat-Gazette, Sept. 3, 1995, at 1A, 20A; *see also* Connie Bruck, *Hillary the Pol*, New Yorker, May 30, 1994, at 58, 69. In the Arkansas Democrat-Gazette article, the newspaper reported that Judge Woods said, "If anything came up regarding President Clinton, I would recuse," because of the Judge's relationship with Hillary Clinton. Nelson, *supra*, at 20A. A column in a daily periodical with national – actually international – circulation reported that Judge Woods wrote to then Deputy White House Counsel, the late Vincent Foster, in July 1993 to ask whether he should grant an interview where the topic was to be Hillary Rodham Clinton. Micah Morrison, *Arkansas Judge Runs the Clock on Whitewater*, Wall St. J., Oct. 4, 1995, at A14. Finally, in a column criticizing efforts "to get federal Judge Henry Woods, a Democratic appointee, off Gov. Jim Guy Tucker's criminal case," the author acknowledged, "Indeed, the judge spent the night at the White House the night Republicans swept a majority of Congress last November." Max Brantley, *Political Notebook*, Ark. Times, June 30, 1995, at 16.

For their part, President and Mrs. Clinton have been reported to have expressed continued support for Tucker since his indictment by the grand jury. It was reported in an article on the front page of the Arkansas Democrat-Gazette that, the day after Tucker pleaded not guilty to the charges in this case, the Clintons attended a fund-raising luncheon in Little Rock, Arkansas, where Tucker received a "sustained standing ovation." Noel Oman &

Peter Aronson, *Clinton lunch also a feast for Tucker,* Ark. Democrat-Gazette, June 24, 1995, at 1A. At the event, solidifying his connection with the recently indicted Tucker, the President said in a speech, "I am especially glad to see Governor and Mrs. Tucker here today and especially grateful for the reception you gave them." *Id.* at 12A. Tucker also acknowledged the perceived connection when he was quoted in an interview as saying of the OIC, "I think that's been much of their goal, to try and tar the [P]resident with images of wrongdoing here in his home state." *Inside Politics* (Cable News Network, Inc., television broadcast, June 21, 1995).

The appellees object to the Independent Counsel's request on several grounds, among them: that the issue was not raised in the District Court and is raised now only because the Independent Counsel did not like the result reached in the proceeding below; that "the motion is . . . frivolous because it is obviously premature to raise such a motion in an appellate court," Brief of Appellee Marks at 38; that Judge Woods's political affiliation, and the Independent Counsel's affiliation with another political party, comprise the basis for the argument; and that the argument is "an improper vehicle for the publication of a personal attack on Judge Woods for the purpose of distracting this Court from a proper review of the district court's dismissal ruling on its merits," *id.* Most of the appellees' claims are undeserving of comment, and we summarily reject the suggestion that appellant's brief is evidence that Judge Woods's political persuasion forms the basis for the Independent Counsel's request. Nowhere do the appellees give us reasons for concluding

that the matters the Independent Counsel has brought to our attention do not create an appearance of bias.

We also reject the contention that the Independent Counsel's request is improperly made to this Court in the first instance rather than to Judge Woods. The appellees' arguments stem from their confusion about the source of our power to grant the OIC's request. "Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances,' 28 U.S.C. Sec. 2106." *Liteky v. United States*, ___ U.S. ___, ___, 114 S.Ct. 1147, 1156-57, 127 L.Ed.2d 474 (1994). Thus we are empowered to "direct the entry of such appropriate . . . order . . . as may be just under the circumstances," 28 U.S.C. Sec. 2106 (1994), including reassignment of the case where, in the language of 28 U.S.C. Sec. 455(a) (1994), the district judge's "impartiality might reasonably be questioned." *See Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir.) (remanding to another district judge to assure the appearance of impartiality, notwithstanding that appeal was from court's failure to recuse *sua sponte* and the issue was never raised in the district court), *cert. denied*, 464 U.S. 982, 104 S.Ct. 424, 78 L.Ed.2d 359 (1983).

The Independent Counsel does not seek review of Judge Woods's failure to disqualify himself under 28 U.S.C. Sec. 144 (1994), which requires the party seeking recusal to timely file an affidavit alleging facts showing bias with the district judge that he wishes to be disqualified. Unlike Sec. 144, Sec. 455 sets forth no procedure for seeking recusal in the district court. *See Liteky*, ___ U.S. at ___, 114 S.Ct. at 1153 (as distinguished from Sec. 144, Sec.

455 "place[s] the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit"). The appellees' reliance on either the language of Sec. 144 or on cases interpreting Sec. 144 is misplaced.

Further, the Eighth Circuit cases cited by the appellees are distinguishable. *See United States v. Bauer*, 19 F.3d 409, 414 (8th Cir.1994) ("This Court has held that claims under Sec. 455 'will not be considered unless timely made.' ") (quoting *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir.1992)). This is not a case like Bauer and Holloway where actual bias under Sec. 455(b) is alleged, and where a judge arguably should have an opportunity first to answer charges of partiality. *See* 28 U.S.C. Sec. 455(b) (1994) (requiring recusal in cases of actual bias, conflicts of interest, and where certain relatives of the judge are involved in the proceedings before the court). Nor is the Independent Counsel seeking to have the judgment vacated on appeal as a remedy for the judge's failure to recuse. In fact, the Independent Counsel seeks no appellate review at all. Rather, he asks to have the case reassigned to a judge other than Judge Woods, under the Sec. 2106 powers of this Court, in the event we reverse the dismissal of the indictment and remand the case for trial. The Independent Counsel made his request for reassignment in his appellant's brief. Under Sec. 2106, that is all that is required to make the request timely.

We turn now to the merits of the OIC's request. Under Sec. 455(a), "disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *Gray v. University of Ark.*,

883 F.2d 1394, 1398 (8th Cir.1989). Section 455(a) "was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n. 7, 108 S.Ct. 2194, 2202 n. 7, 100 L.Ed.2d 855 (1988). In determining, then, whether remand to a different district judge is warranted to achieve the goal of ensuring "the *appearance* of impartiality," we apply "an objective standard of reasonableness." *United States v. Poludniak*, 657 F.2d 948, 954 (8th Cir.1981), *cert. denied*, 455 U.S. 940, 102 S.Ct. 1431, 71 L.Ed.2d 650 (1982). It is the appearance of bias or partiality that matters here, not actual bias.

The Independent Counsel argues that, because of the "unmistakable appearance" of bias or partiality here, "[r]eassignment is necessary to preserve the appearance and reality of justice." Brief of Appellant at 42. We agree. Based on the information before us in this case, we conclude that the risk of a perception of judicial bias or partiality is sufficiently great so that our proper course is to order reassignment on remand.[11] As we have

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[11] The Independent Counsel also directs our attention to certain comments in the District Court's opinion, which were reported in the local Arkansas press, that, in the view of the OIC, "displayed hostility to the Independent Counsel system." Brief of Appellant at 46-47. We do not consider these comments to be persuasive evidence of a perceived bias or partiality.

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

discussed, Judge Woods's link with the Clintons and the Clintons' connection to Tucker have been widely reported in the press. Moreover, as the Independent Counsel has noted, "this case will, as a matter of law, involve matters related to the investigation of the President and Hillary Rodham Clinton." Reply Brief of Appellant at 25. Given the high profile of the Independent Counsel's work and of this case in particular, and the reported connections among Judge Woods, the Clintons, and Tucker, assignment to a different judge on remand is required to insure the perception of impartiality.

As a practical matter, there is no shortage of other judges in the Eastern District of Arkansas to whom this case may be assigned. Apart from whatever time Judge Woods spent in ruling on the motion to dismiss the indictment, judicial resources have not been expended on the case and neither judicial, prosecutorial, nor defense efforts will have to be duplicated when the case is reassigned. The OIC's request for reassignment is granted, not because we believe Judge Woods would not handle the case in a fair and impartial manner (we have every confidence that he would), but only because we believe this step is necessary in order to preserve the appearance as well as the reality of impartial justice.

Liteky, ___ U.S. at ___, 114 S.Ct. at 1157. We conclude that the passages referred to by the OIC, standing alone, would not cause a reasonable person to doubt Judge Woods's impartiality.

IV.

We have taken with the case Marks's motion to strike portions of appellant's brief and appendix, which according to Marks contain "Offending Materials."

We first reject, without lengthy comment, the contention that any part of the appellant's brief raised frivolous arguments or that the brief "reflects a considered decision by the Independent Counsel to attack Judge Woods personally rather than to address the correctness of the trial court's decision on its legal merits." Motion to Strike and Brief in Support Thereof at 12-13. As we have concluded in this opinion, not only are the Independent Counsel's arguments not frivolous, they are meritorious, and the bulk of his brief is indeed devoted to "address[ing] the correctness of the trial court's decision on its legal merits." In any case, Marks need not be concerned that we so easily could be distracted from our duty to review the merits of an appeal that is properly before us. Throughout his motion, Marks mischaracterizes Independent Counsel's advocacy, and comes perilously close to having filed a frivolous motion.

As for the materials that Marks claims have no business being cited in appellant's brief or being included in appellant's appendix, we conclude that they are either documents properly in the record in this case; legal authority properly cited to the Court; or publicly filed or disseminated documents or articles of which we properly may take judicial notice. Here, too, Marks's argument is devoid of merit.

The motion is denied.

V.

The judgment of the District Court dismissing the indictment for lack of prosecutorial jurisdiction is reversed and the case is remanded for trial. The Independent Counsel's motion for reassignment of the case is granted, and the Chief Judge of the United States District Court for the Eastern District of Arkansas is instructed to see that the case is assigned to a judge other than Judge Woods. Marks's motion to strike portions of the Independent Counsel's brief and appendix is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: GRAND JURY NO. GJ-94-75

FILED UNDER SEAL

ORDER

(Filed Aug. 17, 1995)

Pending before the Court are the following motions:

(1) Motion by *Herby Branscum, Jr.* to Quash Subpoena Duces Tecum dated June 27, 1995 (Doc. #105);

(2) Motion by *Herby Branscum P.A.* to Quash Subpoena Duces Tecum Dated June 27, 1995, to the Custodian of the Records (Doc. #106);

(3) Motion by *Robert M. Hill and Robert M. Hill P.A.* to Quash or Modify Subpoena (Doc. #107); and

(4) Motion by *Perry County Bank* to Quash or Modify Subpoena and for Protective Order (Doc. #110).

All four of the Motions challenge the subpoenas on the following grounds: (1) that the August 5, 1994 Order appointing Kenneth Starr as Independent Counsel violates Article III and the Appointments Clause of the United States Constitution; (2) that the December 19, 1994, Order and the July 28, 1995, Order granting related matter jurisdiction to Kenneth W. Starr are invalid expansions of the Independent Counsel's jurisdiction; and (3)

that as Independent Counsel and his attorneys have not taken the oaths required by law an "unauthorized person" issued the subpoenas in question.

One or more of the Motions contend that the subpoenas should be quashed on the following grounds: (1) that the subpoenas to Messrs. Branscum and Hill seeking evidence of contributions to the Clintons 1990 gubernatorial campaign and the 1992 presidential campaign violate the First Amendment right to free speech and association; (2) that the subpoenas are unreasonable and oppressive; (3) that the subpoenas requests information which is protected by the attorney/client privilege; (4) that the subpoena is offensive, abusive and inappropriate; and (5) that Independent Counsel has violated Rule 6(e)(2) of the Federal Rules of Criminal Procedure.

Before addressing any of the specific arguments put fourth by Movants, it is significant that the law provides that rarely may a grand jury witness challenge the grand jury's authority or its jurisdiction as the subpoenaed witness lacks standing to litigate the jurisdictional issues.

> The power of a federal court to compel persons to appear and testify before a grand jury is . . . firmly established. *Kastigar v. United States,* 406 U.S. 441 (1972). The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. *Blaskmer v. United States,* 284 U.S. 421, 438 (1932); *United States v. Bryan,* 339 U.S. 323, 331 (1950). In *Branzburg v. Hayes, supra,* at 682 and 688, the Court noted that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . . " and that "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is

> particularly applicable to grand jury proceedings." The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure. *Blair v. United States*, 250 U.S., at 281. Furthermore, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." *Id.* at 282. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." *Ibid.*

United States v. Calandra, 414 U.S. 338, 345 (1974).

The August 5, 1994, Order of the Special Division of the Court of Appeals for the District of Columbia appointing Independent Counsel granted Mr. Starr the power to investigate and prosecute: " . . . any individuals or entities . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re: Madison Guaranty Savings & Loan Association*, Div No. 94-1, 1 (D.C. Cir. Special Division, August 5, 1994). The Order also provides that:

> [t]he Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal

> criminal law, other than a Class B or C misdemeanor or infraction, by *any person* or entity *developed during* the Independent Counsel's *investigation* referred to above *and* connected with or *arising out of that investigation.*

Id. at 2. The Movants argue that this is an overly broad grant of jurisdiction which violates *Morrison v. Olson,* 108 S.Ct. 2597 (1988). Therein, the Court held as follows:

> . . . we do not think that Congress may give the division unlimited discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the Independent Counsel in the particular case.

Id. at 2613.

It is significant that the Movants are not subpoenaed before the grand jury pursuant to what the Movants are attacking as an overly broad grant of jurisdiction in the original Order appointing Kenneth Starr as Independent Counsel. Rather, the Movants are subpoenaed before the grand jury pursuant to the referral provisions of 28 U.S.C. § 594(e) which provides as follows:

> **Referral of other matters to an independent counsel. –**
>
> *An independent counsel may ask the Attorney General* or the division of the court *to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the*

> *Attorney General* or the division of the court, as the case may be, *may refer such matters.* If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. *If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request,* or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, *the independent counsel shall so notify the division of the court.*

28 U.S.C. § 594(e).

As reflected in the Independent Counsel's Memorandum in Opposition to the Motions to Quash, the Independent Counsel requested on August 29, 1994, pursuant to 28 U.S.C. § 594(e), that the Attorney General refer to the Office of the Independent Counsel responsibility for investigation and possible prosecution of any violations of federal criminal law in connection with accounts by the 1990 Clinton gubernatorial campaign at the Perry County Bank. On September 2, 1994, the Attorney General concluded that the Perry County Bank matter was related to the Independent Counsel's investigation, and referred the matter to the Office of Independent Counsel for investigation and possible prosecution. On September 12, 1994, the Independent Counsel notified the Special Division of the Attorney General's referral. On December 16, 1994, the Independent Counsel applied to the Special Division for an Order of Referral. On December 19, 1994, the Special Division referred the matter to Independent Counsel by granting the application.

On June 8, 1995, the Independent Counsel requested that the Attorney General refer investigative and prosecutorial jurisdiction over certain political contributions made to the 1990 Clinton gubernatorial campaign and the 1992 Clinton presidential campaign. On June 21, 1995, the Attorney General referred the matter to the Independent Counsel. On July 17, 1995, the Independent Counsel notified the Special Division of the Attorney General's referral. On July 20, 1995, the Independent Counsel applied to the Special Division for an Order of Referral. On July 28, 1995, the Special Division referred the matter to the Independent Counsel by granting the application.

The Movants assert that regardless of Independent Counsel proceeding in accordance with 28 U.S.C. § 594(e) that the Attorney General's determination of "relatedness" is in reference to an unconstitutional Order as it is overly broad pursuant to *Morrison*. Thus, the fruit of the tree, they argue, is poisoned. However, the Court does not agree.

> The circumstances requiring the Independent Counsel to employ the jurisdictional expansion procedures, as opposed to relying on his original grant, are distinct. If the new matter is "related to the Independent Counsel's prosecutorial jurisdiction," he must ask the Attorney General or the Special Division to refer it to him formally. *See* 28 U.S.C. § 594(e) (Supp. 1989). If, however, the new matter is "related to [the] subject matter" of the Attorney General's original request for appointment, he may proceed on his own. *See id.* § 593(b)(3).

U.S. v. Secord, 725 F. Supp. 563 (D.D.C. 1989).

The Movants also argue that the Court should set aside the Attorney General's determination of "relatedness". In contrast to the Independent Counsel's argument that the Attorney General's decision is unreviewable, the Movants assert that the actions of the Attorney General should be reviewed by the Court to –

> hold unlawful and set aside any agency action, findings and conclusions found to be:
>
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (b) contrary to constitutional right, power, privilege, or an immunity;
>
> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . .

5 U.S.C. § 706.

The Court agrees with the Independent Counsel's argument that the Attorney General's decision to refer certain matters to the Independent Counsel are issues committed to her discretion and not subject to judicial review. As reflected in the Independent Counsel's Response the conference report to the 1987 amendments to the Act supports this finding:

> The conferees agree that an Attorney General's determinations under the independent counsel laws are not subject to judicial review. This includes such determinations as whether to investigate a person under section 591(c), whether to exercise recusal from a case, and whether to require appointment of an independent counsel. An exception is the Attorney General's decision to remove an independent

> counsel from office; judicial review of that determination is available.

H.R. Conf. Rep. No. 452, 100th Con., 1st Sess. at 22, *reprinted in* 1987 U.S.C.C.A.N. 2150, 2188 (emphasis added).

The Movants asserts that there is no evidence that the Independent Counsel and his attorneys have not taken the oaths required by law resulting in an unauthorized person causing the issuance of the subpoenas. The Independent Counsel asserts that this argument is baseless. Independent Counsel's Opposition to the Motions to Quash and attached exhibits reflect that Kenneth Starr took his oath of office on August 9, 1995, and Associate Independent Counsel Mayopoulos took his oath of office on October 5, 1994. In the Movants' Replies to Independent Counsel's Opposition, the Movants acknowledge that the oaths are in compliance with 5 U.S.C. § 3331 but asserts that there is no evidence of compliance with 5 U.S.C. § 3332 which provides as follows:

> **Officer affidavit; no consideration paid for appointment** – An officer, within 30 days after the effective date of his appointment, shall file with the oath of office required by section 3331 of this title an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment.

As initially stated by the Court, the standing of Movants to challenge the oath is tenuous at best. Furthermore, the Court can not find that this new challenge to the validity of the oaths raised in the Movants' Reply

Briefs shifts the burden to Independent Counsel to make a showing of compliance prior to proceeding with the subpoenas. Furthermore, the original attack made on the validity of the oaths of Independent Counsel was supported with a cite to *United States v. Pignatiello,* 582 F.Supp. 251 (D.Colo. 1984). Therein, an SEC lawyer failed to take an oath to faithfully execute her duties prior to appearing at a grand jury. As a result, the indictment issued by that grand jury was dismissed. The Court finds the case clearly distinguishable as Independent Counsel has provided proof of oath to faithfully execute his duties. Additionally, *Pignatiello* is a post indictment case and is likewise distinguishable on that ground.

The Court finds against Messrs. Branscum and Hill on their First Amendment arguments as well. There has been a showing of a compelling governmental interest and a sufficient nexus between the information sought and the subject matter of the investigation. *In re Faltico,* 561 F.2d 109, 111 (8th Cir. 1977). "The First Amendment generally does not offer protection from a duty to testify before the grand jury." *See Branzburg v. Hayes,* 408 U.S. 665 (1972). *Fogel v. Chestnutt,* 533 F.2d 731 (1st Cir 1976).

The Court finds in favor of the Independent Counsel as to Mr. Hill's and Perry County Bank's arguments that the subpoenas are unreasonable, oppressive, offensive, abusive and inappropriate. Upon review of the subpoenas it is the Court's findings that they are sufficiently narrowly tailored and for a proper purpose. As the Supreme Court stated in *Branzburg,* 408 U.S. 665 "[a] grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been

committed.' " *Id.* at 701 (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

In response to Mr. Hill's argument that the subpoena seeks information which is protected by the attorney/client privilege, the Independent Counsel has agreed that he will not seek to compel disclosure of those documents that Mr. Hill and his counsel affirmatively represent were created by persons other than Mr. Hill and collected by Mr. Hill at the direction of his counsel for counsel's use in preparing Mr. Hill's defense to charges that Independent Counsel might bring against Mr. Hill. Thus, Mr. Hills Motion to Quash is moot as to the issue of attorney/client privilege.

Finally, the Court finds that the Independent Counsel has not violated Rule 6(e)(2) of the Federal Rules of Criminal procedure as the government is not prohibited from revealing information contained in a subpoenaed document to a witness who may be able to provide additional information about it. *See, e.g., United States v. Stanford*, 589 F.2d 285, 291 (7th Cir. 1978).

Thus, the Motion by Herby Bransucm, Jr. to Quash Subpoena Duces Tecum Dated June 27, 1995 (Doc. #105) is denied; the Motion by Herby Branscum, P.A. to Quash Subpoena Duces Tecum Dated June 27, 1995, to the Custodian of the Records (Doc. #106) is denied; the Motion by Robert M. Hill and Robert M. Hill, P.A. (Doc. #107) is denied in part and is moot in part; the Motion by Perry County Bank to Quash or Modify Subpoenas and for Protective Order is denied (Doc. #110).

It is SO ORDERED this 17th day of August, 1995.

/s/ Stephen M. Reasoner
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: GRAND JURY GJ-94-75

FILED UNDER SEAL

ORDER

(Filed Aug. 25, 1995)

Pending before the Court is the Motion of the United States for an Order Compelling Production of Documents Called for by Grand Jury Subpoenas Duces Tecum to Herby Branscum, Jr., Herby Branscum, Jr., P.A., Robert M. Hill, Robert M. Hill, P.A., and Perry County Bank. In response to the Motion of the United States, Movants Herby Branscum, Jr., Herby Branscum, Jr., P.A., Robert M. Hill, Robert M. Hill, P.A., and Perry County Bank have filed a Motion for Reconsideration, Clarification, and Supplemental Motion to Quash Subpoenas. For the reasons listed below, the United States' motion is granted, and the movants' motion is denied.

The court appreciates the position of the movants and their ardent attempts to have the subpoenas at issue quashed. However, the court has thoroughly addressed the issues that the movants have raised in its Order of August 17, 1995, and the time has arrived for the movants to comply with the Grand Jury subpoenas which have been issued.

Therefore, the movants are hereby ORDERED to produce the documents called for by the Grand Jury Subpoenas Duces Tecum Numbers 1100, 1101, 1102, 1103, and 1104 dated June 27, 1995. Movants have until August

31st, 1995 to deliver to the Office of the Independent Counsel said documents as the agent for the Grand Jury.

It is SO ORDERED this 24th day of August, 1995.

/s/ Stephen M Reasoner
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE GRAND JURY PROCEEDINGS — GJ-94-75
Filed Under Seal

ORDER

(Filed Sept. 8, 1995)

Presently before the court are the Government's Motion to Show Cause, and Movants Perry County Bank, Herby Branscum, Herby Branscum, P.A., Robert Hill and Robert Hill, P.A.'s Motion to Stay Imposition of Contempt Sanctions (#143 & #144). The court conducted a hearing on the issues raised in these motions and finds the Movants in contempt of this court's Orders of August 17, 1995 and August 25, 1995. The Movants have until September 15, 1995 to purge themselves of their contempt by fully complying with the Subpoenas Duces Tecum at issue in those Orders. After September 15, 1995, fines of $1,000.00 per day on Herby Branscum, Herby Branscum, P.A., Robert Hill and Robert Hill, P.A. are imposed for each day of non-compliance. Additionally, a fine of $5,000.00 per day is imposed on Perry County Bank for each day of non-compliance. The court reserves ruling on whether the fines may be forgiven if full compliance occurs after September 15, 1995. The court denies the Movants' motions to stay imposition of contempt sanctions.

It is SO ORDERED this 8th day of September, 1995.

/s/ Stephen M. Reasoner
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association — Division No. 94-1

Order Appointing
Independent Counsel

(Filed Aug. 05, 1994

Before: SENTELLE, *Presiding,,* and BUTZNER and SNEED, *Senior Circuit Judges.*

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c) (1) (A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593 (b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with

offices at Kirkland and Ellis, 655-15th Street, NW, Washington, DC, 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such

matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards

exist against actual or *perceived* conflicts of interest without reflecting adversely on the parties who are subject to conflicts." S. Rep. No. 496, 97th Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the Act that the actor be protected against perceptions of conflict. As Fiske was appointed by the incumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the Act that a person not affiliated with the incumbent administration be appointed.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592 (e) and of the ongoing public proceedings and interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed,

IT IS SO ORDERED.

Per Curiam
For the Court:

/s/ Ron Garvin
Ron Garvin, Clerk

APPENDIX F

[SEAL] **U.S. Department of Justice**

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 2, 1994

Mr. Kenneth W. Starr
Two Financial Centre
10825 Financial Centre Parkway
Suite 134
Little Rock, Arkansas 72211

Dear Mr. Starr:

The Attorney General has received your letter of August 29, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the the course of the investigation conducted by the office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your office would be appropriate. I therefore refer investigative and prosecutorial jurisdiction over the following matters to your office:

(1) Whether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank; and

REDACT REDACT REDACT

Your jurisdiction affords you necessary flexibility in structuring your investigation. To the extent you determine that aspects of these matters which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may wish to consider referring those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. § 597(a).

Should you wish at any time to consult with the Department of Justice concerning Departmental policies with respect to these criminal tax, campaign financing, or other matters, 28 U.S.C. § 594(f)(1), I invite you to contact Lee J. Radek, Chief, Public Integrity Section, Criminal Division, who will put you in touch with the appropriate Departmental officials. He can be reached at (202) 514-1412.

To complete our files, I would appreciate your providing Mr. Radek with a copy of your notification to the Special Division of the Court of this referral. 28 U.S.C. § 594(e). Please let us know if we can be of any further assistance to you in the course of your investigation.

Sincerely,

/s/ John C. Keeney
Acting Assistant
Attorney General
Criminal Division

[SEAL] **U.S. Department of Justice**
Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 21, 1995

The Honorable Kenneth W. Starr
Independent Counsel
Office of the Independent Counsel
Two Financial Centre Parkway
Suite 134
Little Rock, Arkansas 72211

Dear Judge Starr:

The Attorney General has received your letter of June 8, 1995, requesting that the Department of Justice refer to the Office of the Independent Counsel/Madison Guaranty Bank a related matter pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the course of the investigation conducted by the Office of the Independent Counsel, she has concluded that this matter is related to one of the matters referred to you by the Department of Justice on September 2, 1994, and that referral to your office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matter to your office:

> Whether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial

campaign or the 1992 Clinton presidential campaign.

This referral is broad enough to afford you necessary flexibility in structuring your investigation. However, to the extent you determine that aspects of this matter which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice. 28 U.S.C. § 597(a).

Should you wish at any time to consult with the Department of Justice concerning Departmental policies with respect to this or any other matter, 28 U.S.C. § 594(f)(1), please do not hesitate to contact either me or Lee J. Radek, Chief, Public Integrity Section, and we will put you in touch with the appropriate Departmental officials.

To complete our files, I would appreciate your providing me with a copy of your notification to the Special Division of the Court of this referral. 28 U.S.C. § 594(e). Please let me know if we can be of any further assistance to you in the course of your investigation.

Sincerely,

/s/ Jo Ann Harris
Jo Ann Harris
Assistant Attorney General

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association — Division No. 94-1

FILED UNDER SEAL

ORDER

(Filed July 28, 1995)

Before: Sentelle, Presiding, Butzner and Fay, Senior Circuit Judges

Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal on July 21, 1995, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594 (e):

(1) Whether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign; and

REDACTED REDACTED REDACTED

REDACTED

IT IS FURTHER ORDERED, that, as a result of the referral of the above-described matters, the referral of the matters set forth in the Order of this Court entered December 19, 1994, and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation, including, but not limited to:

(1) Whether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank;

REDACTED REDACTED

REDACTED REDACTED REDACTED

REDACTED REDACTED REDACTED

REDACTED REDACTED REDACTED

(8) Whether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign; and

REDACTED REDACTED REDACTED

The Independent Counsel has jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel has jurisdiction and authority to seek indictment and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel has all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

The Independent Counsel, as authorized by 28 U.S.C. § 594, has prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

REDACTED	REDACTED	REDACTED
REDACTED	REDACTED	REDACTED

IT IS SO ORDERED.

Dated: July 28, 1995

Per curiam
For the Court:

/s/ Mark J. Langer
Mark J. Langer, Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division of the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association

Division No. 94-1

UNDER SEAL

(Filed Dec. 19, 1994)

ORDER

Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594(e):

(1) Whether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank;

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

REDACT REDACT REDACT
REDACT REDACT REDACT
REDACT REDACT REDACT

IT IS FURTHER ORDERED, that, as a result of the referral of the above-described matters and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation, including, but not limited to:

(1) Whether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank;

REDACT REDACT REDACT
REDACT REDACT REDACT

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

The Independent Counsel has jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel has jurisdiction and authority to seek indictment and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel has all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

The Independent Counsel, as authorized by 28 U.S.C. § 594, has prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, and all matters and individuals whose acts may be related to that subject matter, inclusive of

authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

Per Curiam
For the Court:

IT IS SO ORDERED.

Dated: December 19, 1994

/s/ Ron Garvin
Ron Garvin, Clerk

APPENDIX I

UNITED STATES CONSTITUTION, ARTICLE I, § 1

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

UNITED STATES CONSTITUTION, ARTICLE II, § 2

The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think

proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

UNITED STATES CONSTITUTION, ARTICLE III, § 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

UNITED STATES CONSTITUTION, ARTICLE III, § 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to

controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

---

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

---

5 U.S.C. § 2104. Officer

(a) For the purpose of this title, "officer", except as otherwise provided by this section or when specifically

modified, means a justice or judge of the United States and an individual who is –

(1) required by law to be appointed in the civil service by one of the following acting in an official capacity –

(A) the President;

(B) a court of the United States;

(C) the head of an Executive agency; or

(D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.

(b) Except as otherwise provided by law, an officer of the United States Postal Service or of the Postal Rate Commission is deemed not an officer for purposes of this title.

---

5 U.S.C. § 2903. Oath: authority to administer

(a) The oath of office required by section 3331 of this title may be administered by an individual authorized by the laws of the United States or local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered.

(b) An employee of an Executive agency designated in writing by the head of the Executive agency, or the Secretary of a military department with respect to an employee of his department, may administer –

> **(1)** the oath of office required by section 3331 of this title, incident to entrance into the executive branch; or
>
> **(2)** any other oath required by law in connection with employment in the executive branch.

(c) an oath authorized or required under the laws of the United States may be administered by –

> **1.** the Vice President; or
>
> **2.** an individual authorized by local law to administer oaths to the State, District, or territory or possession of the United States where the oath is administered.

---

5 U.S.C. § 3331. Oath of office

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this

obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." This section does not affect other oaths required by law.

---

5 U.S.C. § 3332. Office affidavit; no consideration paid for appointment

An officer, within 30 days after the effective date of his appointment, shall file with the oath of office required by section 3331 of this title an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment.

---

5 U.S.C. § 5312. Positions at level I

Level I of the Executive Schedule applies to the following positions for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:

Secretary of State.

Secretary of the Treasury.

Secretary of Defense.

Attorney General.

Secretary of the Interior.

Secretary of Agriculture.

Secretary of Commerce.

Secretary of Labor.

Secretary of Health and Human Services.

Secretary of Housing and Urban Development.

Secretary of Transportation.

United States Trade Representative.

Secretary of Energy.

Secretary of Education.

Secretary of Veterans Affairs.

Director of the Office of Management and Budget.

Director of National Drug Control Policy.

Commissioner of Social Security, Social Security Administration.

---

5 U.S.C. § 5507. Officer affidavit; condition to pay

An officer required by section 3332 of this title to file an affidavit may not be paid until the affidavit has been filed.

---

28 U.S.C. § 591. Applicability of provisions of this chapter

(a) Preliminary investigation with respect to certain covered persons. – The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(b) Persons to whom subsection (a) applies. – The persons referred to in subsection (a) are –

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of title 5;

(3) any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice who is compensated at a rate of pay at or

above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President; and

(7) any individual who held an office or position described in paragraph (1), (2), (3), (4), or (5) for 1 year after leaving the office or position.

[(8) Redesignated (6)]

(c) Preliminary investigation with respect to other persons. –

(1) In general. – When the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(2) Members of Congress. – When the Attorney General determines that it would be in the public interest, the Attorney General may

conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether a Member of Congress may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(d) Examination of information to determine need for preliminary investigation. –

(1) Factors to be considered. – In determining under subsection (a) or (c) (or section 592(c)(2)) whether grounds to investigate exist, the Attorney General shall consider only –

(A) the specificity of the information received; and

(B) the credibility of the source of the information.

(2) Time period for making determination. – The Attorney General shall determine whether grounds to investigate exist not later than 30 days after the information is first received. If within that 30-day period the Attorney General determines that the information is not specific or is not from a credible source, then the Attorney General shall close the matter. If within that 30-day period the Attorney General determines that the information is specific and from a credible source, the Attorney General shall, upon making that determination, commence a preliminary investigation with respect to that information. If the Attorney General is unable to determine, within that 30-day period, whether the information is specific and from a credible source, the Attorney General shall, at

the end of that 30-day period, commence a preliminary investigation with respect to that information.

(e) Recusal of Attorney General –

(1) When recusal is required. – (A) If information received under this chapter involves the Attorney General, the next most senior official in the Department of Justice who is not also recused shall perform the duties assigned under this chapter to the Attorney General.

(B) If information received under this chapter involves a person with whom the Attorney General has a personal or financial relationship, the Attorney General shall recuse himself or herself by designating the next most senior official in the Department of Justice who is not also recused to perform the duties assigned under this chapter to the Attorney General.

(2) Requirements for recusal determination. – Before personally making any other determination under this chapter with respect to information received under this chapter, the Attorney General shall determine under paragraph (1)(B) whether recusal is necessary. The Attorney General shall set forth this determination in writing, identify the facts considered by the Attorney General, and set forth the reasons for the recusal. The Attorney General shall file this determination with any notification or application submitted to the division of the court under this chapter with respect to such information.

(As amended Pub.L. 103-270, §§ 3(j), (k), 4 June 30, 1994, 108 Stat. 735, 736.)

28 U.S.C. § 592. Preliminary investigation and application for appointment of an independent counsel

(a) Conduct of preliminary investigation. –

(1) In general. – A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

(2) Limited authority of Attorney General. – **(A)** In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person

lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

(3) Extension of time for preliminary investigation. – The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

(b) Determination that further investigation not warranted. –

(1) Notification of division of the court. – If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) Form of notification. – Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

(c) Determination that further investigation is warranted. –

(1) Application for appointment of independent counsel. – The Attorney General shall apply to the division of the court for the appointment of an independent counsel if –

(A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1).

In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

(2) Receipt of additional information. – If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall –

(A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and

(B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.

(d) Contents of application. – Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

(e) Disclosure of information. – Except as otherwise provided in this chapter or as is deemed necessary for law enforcement purposes, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other document, materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress.

(f) Limitation on judicial review. – The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

(g) Congressional request. –

(1) By Judiciary Committee or members thereof. – The Committee on the Judiciary of

either House of the Congress, or a majority of majority party members or a majority of all non-majority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.

(2) Report by Attorney General pursuant to request. – Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on which the preliminary investigation began or will begin.

(3) Submission of information in response to congressional request. – At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1) such notification, application, or other document, material, or memorandum shall be supplied to the committee making the request, or to

the committee on which the persons making the request serve. If no application for the appointment of an independent counsel is made to the division of the court under this section pursuant to such a preliminary investigation, the Attorney General shall submit a report to that committee stating the reasons why such application was not made, addressing each matter with respect to which the congressional request was made.

(4) Disclosure of information. – Any report, notification, application, or other document, material, or memorandum supplied to a committee under this subsection shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such report, notification, application, document, material, or memorandum as will not in the committee's judgment prejudice the rights of any individual.

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28 U.S.C. § 593. Duties of the division of the court

(a) Reference to division of the court. – The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Appointment and jurisdiction of independent counsel. –

(1) Authority. – Upon receipt of an application under section 592(c), the division of the

court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

(2) Qualifications of independent counsel. – The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(3) Scope of prosecutorial jurisdiction. – In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

(4) Disclosure of identity and prosecutorial jurisdiction. – An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

(c) Expansion of jurisdiction. –

(1) In general. – The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.

(2) Procedure for request by Independent counsel. – **(A)** If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determination

required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

(B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel or to appoint another independent counsel with respect to the matters involved.

(C) If –

(i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

(ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted,

the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters.

(d) Return for further explanation. – Upon receipt of a notification under section 592 or subsection (c)(2)(B) of this section from the Attorney General that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter, the division of the court shall have no authority to overrule this determination but may return

the matter to the Attorney General for further explanation of the reasons for such determination.

(e) Vacancies. – If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel to complete the work of the independent counsel whose resignation, death, or removal caused the vacancy, except that in the case of a vacancy arising by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed.

(f) Attorneys' fees. –

(1) Award of fees. – Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the [1] independent counsel who conducted the investigation and Attorney General of any request for attorneys' fees under this subsection.

(2) Evaluation of fees. – The division of the court shall direct such independent counsel

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[1] So in original.

and the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, addressing –

(A) the sufficiency of the documentation;

(B) the need or justification for the underlying item;

(C) whether the underlying item would have been incurred but for the requirements of this chapter; and

(D) the reasonableness of the amount of money requested.

(g) Disclosure of information. – The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter.

(h) Amicus curiae briefs. – When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curiae briefs.

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28 U.S.C. § 594. Authority and duties of an independent counsel

(a) Authorities. – Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such

independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include –

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other

court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and

(10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

(b) Compensation. –

(1) In general. – An independent counsel appointed under this chapter shall receive compensation at the per diem rate equal to the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5.

(2) Travel expenses. – Except as provided in paragraph (3), an independent counsel and persons appointed under subsection (c) shall be entitled to the payment of travel expenses as provided by subchapter I of chapter 57 of title 5,

United States Code, including travel, per diem, and subsistence expenses in accordance with section 5703 of title 5.

(3) Travel to primary office. –

(A) In general. – After 1 year of service under this chapter, an independent counsel and persons appointed under subsection (c) shall not be entitled to the payment of travel, per diem, or subsistence expenses under subchapter I of chapter 57 of title 5, United States Code, for the purpose of commuting to or from the city in which the primary office of the independent counsel or person is located. The 1-year period may be extended by 6 months if the employee assigned duties under subsection (*l*)(I)(A)(iii) certifies that the payment is in the public interest to carry out the purposes of this chapter.

(B) Relevant factors. – In making any certification under this paragraph with respect to travel and subsistence expenses of an independent counsel or person appointed under subsection (c), such employee shall consider, among other relevant factors –

(i) the cost to the Government of reimbursing such travel and subsistence expenses;

(ii) the period of time for which the independent counsel anticipates that the activities of the independent counsel or person, as the case may be, will continue;

(iii) the personal and financial burdens on the independent counsel or person, as the case may be, of relocating so that such travel and subsistence expenses would not be incurred; and

(iv) the burdens associated with appointing a new independent counsel, or appointing another person under subsection (c), to replace the individual involved who is unable or unwilling to so relocate.

(c) **Additional personnel.** – For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. Such employees shall be compensated at levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia under sections 548 and 550, but in no event shall any such employee be compensated at a rate greater than the rate of basic pay payable for level ES-4 of the Senior Executive Service Schedule under section 5382 of title 5, as adjusted for the District of Columbia under section 5304 of that title regardless of the locality in which an employee is employed.

(d) **Assistance of Department of Justice.** –

(1) **In carrying out functions.** – An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the

Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties. At the request of an independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel.

(2) Payment of and reports on expenditures of independent counsel. – The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593(b)(4).

(e) Referral of other matters to an independent counsel. – An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral

if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

(f) Compliance with policies of the Department of Justice. –

> **(1) In general.** – An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies and policies under subsection (*l*)(1)(B), the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.
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> **(2) National security.** – An independent counsel shall comply with guidelines and procedures used by the Department in the handling and use of classified material.

(g) Dismissal of matters. – The independent counsel shall have full authority to dismiss matters within the independent counsel's prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(h) Reports by independent counsel. –

(1) Required reports. – An independent counsel shall –

(A) file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which identifies and explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to which the report is filed, and estimates future expenses of that office; and

(B) before the termination of the independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.

(2) Disclosure of information in reports. – The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a final report filed under paragraph (1)(B) available to any individual named in such report for the purposes of receiving within a time limit set by the

division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report.

(i) Independence from Department of Justice. – Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18.

(j) Standards of conduct applicable to independent counsel, persons serving in the office of an independent counsel, and their law firms. –

(1) Restrictions on employment while independent counsel and appointees are serving. – **(A)** During the period in which an independent counsel is serving under this chapter –

(i) such independent counsel, and

(ii) any person associated with a firm with which such independent counsel is associated,

may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(B) During the period in which any person appointed by an independent counsel under subsection (c) is serving in the office of independent counsel, such person may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(2) Post employment restrictions on independent counsel and appointees. – **(A)** Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 3 years following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter if that individual was the subject of an investigation or prosecution under this chapter that was conducted by that independent counsel.

(B) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 1 year following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter involving any investigation or prosecution under this chapter.

(3) One-year ban on representation by members of firms of independent counsel. – Any person who is associated with a firm with which an independent counsel is associated or becomes associated after termination of the service of that independent counsel under this chapter may not, for 1 year following such termination, represent any person in any matter involving any investigation or prosecution under this chapter.

(4) Definitions. – For purposes of this subsection –

(A) the term "firm" means a law firm whether organized as a partnership or corporation; and

(B) a person is "associated" with a firm if that person is an officer, director, partner, or other member or employee of that firm.

(5) Enforcement. – The Attorney General and the Director of the Office of Government Ethics have authority to enforce compliance with this subsection.

(k) Custody of records of an independent counsel. –

(1) Transfer of records. – Upon termination of the office of an independent counsel, that independent counsel shall transfer to the Archivist of the United States all records which have been created or received by that office. Before this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials and which of these records have been classified as national security information. Any records which were compiled by an independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere before the enactment of the Independent Counsel Reauthorization Act of 1987, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

(2) Maintenance, use, and disposal of records. – Records transferred to the Archivist under this chapter shall be maintained, used, and disposed of in accordance with chapters 21, 29, and 33 of title 44.

(3) Access to records. –

(A) In general. – Subject to paragraph (4), access to the records transferred to the Archivist under this chapter shall be governed by section 552 of title 5.

(B) Access by Department of Justice. – The Archivist shall, upon written application by the Attorney General, disclose any such records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding, except that, in the case of grand jury materials, such records shall be so disclosed only by order of the court of jurisdiction under rule 6(e) of the Federal Rules of Criminal Procedure.

(C) Exception. – Notwithstanding any restriction on access imposed by law, the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

(4) Records provided by Congress. – Records of an investigation conducted by a committee of the House of Representatives or the Senate which are provided to an independent counsel to assist in an investigation or prosecution conducted by that independent counsel –

(A) shall be maintained as a separate body of records within the records of the independent counsel; and

(B) shall, after the records have been transferred to the Archivist under this chapter, be made available, except as provided in paragraph (3)(B) and (C), in accordance with the rules governing release of the records of the House of Congress that provided the records to the independent counsel.

Subparagraph (B) shall not apply to those records which have been surrendered pursuant to grand jury or court proceedings.

(l) **Cost controls and administrative support. –**

(1) Cost controls. –

(A) In general. – An independent counsel shall –

(i) conduct all activities with due regard for expense;

(ii) authorize only reasonable and lawful expenditures; and

(iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the independent counsel are reasonable and made in accordance with law.

(B) Liability for invalid certification. – An employee making a certification under subparagraph (A)(iii) shall be liable for an invalid certification to the same extent as a certifying official certifying a voucher is liable under section 3528 of title 31.

(C) Department of justice policies. – An independent counsel shall comply with the established policies of the Department

of Justice respecting expenditures of funds, except to the extent that compliance would be inconsistent with the purposes of this chapter.

(2) Administrative support. – The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each independent counsel. No officer or employee of the Administrative Office of the United States Courts shall disclose information related to an independent counsel's expenditures, personnel, or administrative acts or arrangements without the authorization of the independent counsel.

(3) Office space. – The Administrator of General Services, in consultation with the Director of the Administrative Office of the United States Courts, shall promptly provide appropriate office space for each independent counsel. Such office space shall be within a Federal building unless the Administrator of General Services determines that other arrangements would cost less. Until such office space is provided, the Administrative Office of the United States Courts shall provide newly appointed independent counsels immediately upon appointment with appropriate, temporary office space, equipment, and supplies.

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28 U.S.C. § 595. Congressional oversight

(a) Oversight of conduct of independent counsel. –

(1) Congressional oversight. – The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(2) Reports to Congress. – An independent counsel appointed under this chapter shall submit to the Congress annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made.

(b) Oversight of conduct of Attorney General. – Within 15 days after receiving an inquiry about a particular case under this chapter, which is a matter of public knowledge, from a committee of the Congress with jurisdiction over this chapter, the Attorney General shall provide the following information to that committee with respect to that case:

(1) When the information about the case was received.

(2) Whether a preliminary investigation is being conducted, and if so, the date it began.

(3) Whether an application for the appointment of an independent counsel or a notification that further investigation is not warranted has been filed with the division of the court, and if so, the date of such filing.

(c) Information relating to impeachment. – An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

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28 U.S.C. § 596. Removal of an independent counsel; termination of office

(a) Removal; report on removal. –

(1) Grounds for removal. – An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability),[1] or any other condition that substantially impairs

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[1] So in original.

the performance of such independent counsel's duties.

(2) Report to division of the court and Congress. – If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report. The division of the court may release any or all of such report in accordance with section 594(h)(2).

(3) Judicial review of removal. – An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia. A member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.

(b) Termination of office. –

(1) Termination by action of independent counsel. – An office of independent counsel shall terminate when –

(A) the independent counsel notifies the Attorney General that the investigation

of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

(B) the independent counsel files a final report in compliance with section 594(h)(1)(B).

(2) Termination by division of the court. – The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of such termination, the independent counsel shall file the final report required by section 594(h)(1)(B). If the Attorney General has not made a request under this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

(c) **Audits.** – (1) On or before June 30 of each year, an independent counsel shall prepare a statement of expenditures for the 6 months that ended on the immediately preceding March 31. On or before December 31 of each year, an independent counsel shall prepare a statement of expenditures for the fiscal year that ended on the immediately preceding September 30. An independent counsel whose office is terminated prior to the end of the fiscal year shall prepare a statement of expenditures on or before the date that is 90 days after the date on which the office is terminated.

(2) The Comptroller General shall –

(A) conduct a financial review of a mid-year statement and a financial audit of a year-end statement and statement on termination; and

(B) report the results to the Committee on the Judiciary, Committee on Governmental Affairs, and Committee on Appropriations of the Senate and the Committee on the Judiciary, Committee on Government Operations, and Committee on Appropriations of the House of Representatives not later than 90 days following the submission of each such statement.

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28 U.S.C. § 597. Relationship with Department of Justice

(a) **Suspension of other investigations and proceedings.** – Whenever a matter is in the prosecutorial

jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Presentation as amicus curiae permitted. – Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

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28 U.S.C. § 598. Severability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected by such invalidation.

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28 U.S.C. § 599. Termination of effect of chapter

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

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28 U.S.C. § 1826. Recalcitrant witnesses

(a) Wherever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of –

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

PUBLIC LAW 100-191 – DEC. 15, 1987

28 U.S.C. § 599. Termination of effect of chapter

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of

such counsel require such continuation until that independent counsel determines such matters have been completed.

PUBLIC LAW 103-270 – JUNE 30, 1994

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SEC. 2. FIVE-YEAR REAUTHORIZATION.

Section 599 of title 28, United States Code, is amended by striking "1987" and inserting "1994".

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